TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 238

LIBERTY NATIONAL BANK OF ROANOKE, VIRGINIA, PETITIONER,

vs.

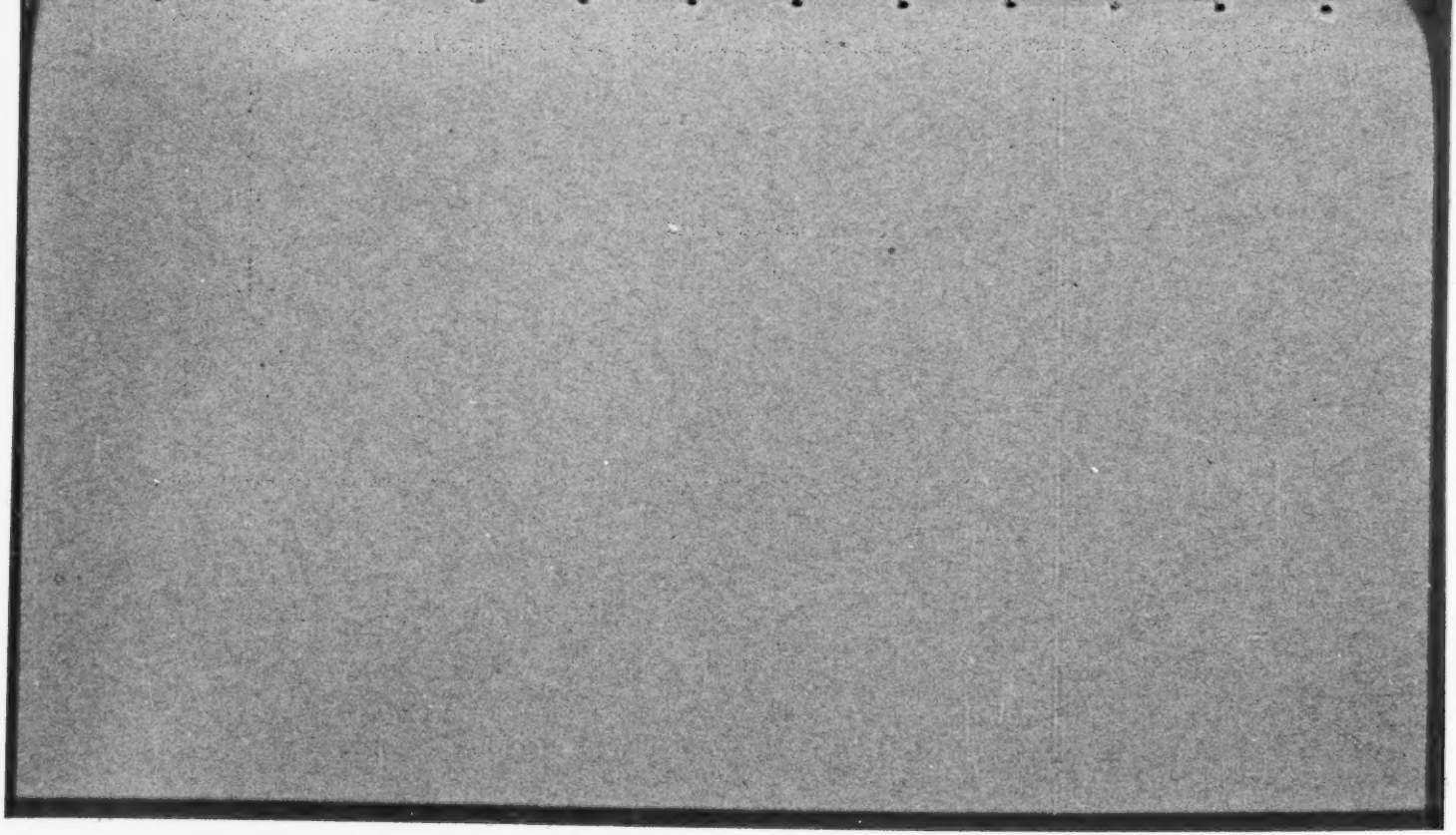
JAMES A. BEAR, TRUSTEE IN BANKRUPTCY OF THE ESTATES OF W. L. BECKER, SR., AND W. L. BECKER, JR., PARTNERS, ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 3, 1923

CERTIORARI AND RETURN FILED JUNE 2, 1923

(29,439)



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[fol.1] **UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT**

No. 2011

In Bankruptcy

JAMES A. BEAR, Trustee in Bankruptcy of the Estates of W. L. Becker, Sr., and W. L. Becker, Jr., Partners Trading as W. L. Becker & Company and as the Roanoke Provision Company, and Trustee in Bankruptcy of the Individual Estates of W. L. Becker, Sr., and W. L. Becker, Jr., Bankrupts, Petitioner,

versus

THE LIBERTY NATIONAL BANK OF ROANOKE, VIRGINIA, a Corporation, Respondent.

On Petition to Superintend and Revise, in Matter of Law, Proceedings of the District Court of the United States for the Western District of Virginia, at Roanoke.

PETITION TO SUPERINTEND AND REVISE, ETC.—Filed May 31, 1922

To the Honorable the Judges of the Circuit Court of Appeals of the Fourth Circuit of the United States:

Your petitioner respectfully shows:

(1) That he was duly elected and qualified as Trustee in Bankruptcy of the estate of W. L. Becker, Sr., and W. L. Becker, Jr., [fol. 2] partners trading as W. L. Becker & Company and as the Roanoke Provision Company, and was duly elected and qualified as Trustee of the estates of W. L. Becker, Sr., and W. L. Becker, Jr., as individuals, Bankrupts.

(2) That heretofore, to-wit, on August 6th, 1920, Runkle & Company, a Corporation, et al., filed their petition in the Clerk's Office of the United States District Court for the Western District of Virginia, at Roanoke, Virginia, alleging that W. L. Becker, Sr., and W. L. Becker, Jr., a partnership trading both as W. L. Becker & Company and as the Roanoke Provision Company, had committed an act of bankruptcy by the execution of a deed of assignment for the benefit of their creditors. On August 7th, 1920, W. L. Becker, Sr., and W. L. Becker, Jr., filed in the Clerk's Office of said Court, at Roanoke, Virginia, their joint answer to this petition, in which they appeared, waived issuance of service of process and admitted the allegations of said petition to be true and correct. On August 7th, 1920, a Receiver was appointed for certain of the bankrupt's property, and on August 20th, 1920, W. L. Becker, Sr., and W. L. Becker, Jr., partners trading as aforesaid, were adjudged bankrupts and the

case referred to R. Q. Mosby, Referee at Roanoke, Virginia, and said bankrupts directed to appear before him on August 21st, 1920. On August 23rd, 1920, R. Q. Mosby, then Referee, entered an order, reciting the adjudication of bankruptcy and directed W. L. Becker, Sr., and W. L. Becker, Jr., to file in triplicate in the Clerk's Office of said Court on or before the 2nd day of September, 1920, a complete list of their creditors, together with the amount due each of them, and a complete list of their partnership assets, describing the same fully, and further ordered that both W. L. Becker, Sr., and W. L. Becker, Jr., should file with the Referee on or before the aforesaid date a schedule of their respective individual creditors and a list of their individual assets, and should likewise file such similar schedules of assets and liabilities in triplicate in said Clerk's Office. On August 30th, 1920, the said bankrupts complied with this order of the Referee and filed such lists of both their partnership assets and liabilities, as well as their individual assets and liabilities.

[fol. 3] (3) That thereafter, to-wit, on September 11th, 1920, the first meeting of the creditors was held and adjourned to September 25th, 1920, on which date the partnership offered to their creditors a composition. Various meetings of the creditors were held in reference to this composition from time to time until November 29th, 1920, on which date W. L. Becker, Sr., and W. L. Becker, Jr., filed an amended offer of composition, and on December 2nd, 1920, filed a petition asking for the confirmation of said order. Another creditors' meeting was held on December 23rd, 1920, at which a majority in amount and number of the creditors voted in favor of the composition, and at this meeting the Liberty National Bank of Roanoke, Virginia, filed a straight proof of claim, alleging that W. L. Becker, Sr., and W. L. Becker, Jr., partners trading as the Roanoke Provision Company were indebted to it in the sum of $5,566.99, with interest*est* and attorneys' fees, as set out in said proof, which alleged that the said Bank had received no security for this debt.

(4) In the meantime meetings of the partnership creditors had been held from time to time and the Referee had certified to the United States District Court for the Western District of Virginia, his report on the amended offer of composition, together with the evidence taken thereon. This report of the Referee was filed on December 28th, 1920, and on the same day the Liberty National Bank filed its objection to the confirmation of the composition offer, alleging that such confirmation would not be to the best interests of the individual creditors of the Beckers, nor for the best interests for such of the creditors of the bankrupts whose debts were likewise against the individuals composing the partnership. This proof filed at this time further alleged that the Bank's debt had been reduced to judgment against both the partnership and the individuals composing the partnership. That since petitions in bankruptcy had not been filed against either of the individuals and that they had not been adjudged bankrupts, and the judgment being over four months old, they were entitled to priority in the distribution of the estates of the

individuals and that such judgment was claimed to be a lien on both the real and personal and homestead property of the individuals. [fol. 4] This objection to the confirmation of the composition is the first pleading appearing in the record by which the Liberty National Bank claims that it is entitled to priority, as the actual proof asserting such priority was not filed until January 6th, 1921. In fact, never until the filing of this objection to the composition did counsel for the respondent bank intimate that he expected to claim a lien on the property of the individuals by reason of the fact that the judgment which he had obtained against both the partnership and the individuals had reached the age of four months. It is a fact that on the 12th day of October, 1920, at a creditors' meeting held on that date, counsel for the respondent bank did state that he objected to the offer of composition and repeated and reiterated this objection at numerous times during proceedings held on that day, stating in each of these objections that he objected to the composition for the reason that in order to make it effective it would be necessary to mortgage the individual properties, in order to secure the money with which to pay the composition offer. But at none of these meetings did counsel for respondent bank advise the other counsel present that he expected to claim that his judgment was a lien on the estates of the individuals composing the partnership.

(5) On January 6th, 1921, respondent bank filed its proof of debt against W. L. Becker, Sr., and W. L. Becker, Jr., partners trading as the Roanoke Provision Company, alleging that the consideration was for money advanced to W. L. Becker, Sr., and W. L. Becker, Jr., that the same was evidenced by the joint note of the Roanoke Provision Company and W. L. Becker and also endorsed individually and personally by W. L. Becker, Sr., and W. L. Becker, Jr. That the said claim evidenced by said note had been reduced to judgment at the July, 1920, term of the Corporation Court for the City of Roanoke, against W. L. Becker, Sr., and W. L. Becker, Jr., partners trading as the Roanoke Provision Company, and also against both W. L. Becker, Sr., and W. L. Becker, Jr., individually, they having been sued both as individuals and as partners. Said Bank further claimed that execution was issued upon this judgment and that the said judgment, as well as said execution, were liens upon [fol. 5] all property of both of the Beckers; that four months had now elapsed since said judgment was docketed against the real estate of these individuals and that not having been adjudged bankrupts on any petition filed against them, or in the administration of either estate; that the said judgment was a secured claim and it was entitled to priority in the distribution of the estate. On January 10th, 1921, the bankrupt partnership filed its petition, asking for a confirmation of the amended offer of composition.

(6) During this lapse of time both the original and amended offer of composition had been certified by the Referees to the Judge of the United States District Court for the Western District of Virginia, and having been adjourned from time to time, the hearing was had

on the two offers of composition and objection to the confirmation thereof by the respondent bank, at which hearing the District Court held that the objection to these offers of composition made by respondent bank was well made and, therefore, entered an order declining to confirm the composition and directing that the money which had been deposited with the Court be refunded and that the deed of trust liens given on the individual properties be released.

(7) On April 27th, 1921, the said W. L. Becker, Sr., and W. L. Becker, Jr., filed their voluntary petitions in bankruptcy in the United States District Court for the Western District of Virginia, with the requisite schedules, and on April 28th, 1921, they were both adjudged voluntary bankrupts.

(8) On May 6th, 1921, your petitioner was appointed and qualified as Trustee as aforesaid and proceeded with the administration of both partnership and individual estates.

(9) On May 31st, 1921, respondent bank filed its separate proof of claim against W. L. Becker, Sr., and W. L. Becker, Jr., alleging practically the same facts that were alleged in the objection to the offer of composition filed on January 3rd, 1921, and in the proof of claim filed on January 6th, 1921, against the partnership. These last mentioned proofs of claims are practically counterparts of each other, [fol. 6]and after setting out the debts, the rendition of the judgment, the issuance of execution thereon and delivery to the proper State officer, alleged that the partnership having been adjudged a bankrupt on August 20th, 1920, but the individual bankrupts composing the partnership not having been so adjudged until April 28th, 1921, that respondent bank was, by virtue of the docketing of said judgment and issuance of execution thereon, entitled to assert a prior or secured claim against the individual property of both W. L. Becker and W. L. Becker, Jr. These proofs further allege that notwithstanding the fact that a Receiver was appointed to take charge of certain property of the partnership, he secured no dominion or control over the individual property of the bankrupts, but that such property had remained in the possession of the individual bankrupts.

(10) That thereafter, to-wit, on August 15th, 1921, your petitioner, Trustee as aforesaid, sold the two residences owned by said individuals, as well as certain other real estate which they owned and such remaining property of the partnership as was then in his hands, said sales being made free of liens and the proceeds of which sales are now in the hands of your petitioner as Trustee, subject to the order of the bankruptcy court.

(11) That the proceeds of sale of the property of the bankrupt partnerships are not sufficient to pay their creditors, nor are the proceeds of sale of the property of the individuals sufficient to pay their creditors.

(12) That thereafter, to-wit, on December 1st, 1921, your petitioner filed before A. P. Staples, Esquire, then sitting as Special Referee, his objections to the allowance of the claim of respondent

bank as a secured or priority claim, asserting that said Bank was only entitled to a ratable distribution with the other partnership and individual creditors, and denying that its judgment was a valid lien against the properties of either the partnerships or individuals.

(13) That thereafter, to-wit, on December 9th, 1921, the matter [fol. 7] being heard upon the said claims filed by the respondent bank and the objections thereto by your petitioner, said Special Referee, A. P. Staples, Esquire, entered an order sustaining the objections of your petitioner and disallowed the claims of respondent bank as secured claims, but ordered that they be allowed as unsecured claims against the estates of W. L. Becker, Sr., and W. L. Becker, Jr., and the Roanoke Provision Company.

(14) That thereafter, to-wit, on March 7th, 1922, respondent bank filed before said Special Referee his petition for review and petition for appeal, which, together with a summary of the evidence in the matter, the opinion of the said Referee and the assignment of error of said respondent bank, were forwarded to the Judge of the United States District Court for the Western District of Virginia, who, on May 23rd, 1922, entered an order stating that for reasons set out in the opinion of said court likewise filed on May 23rd, the order of the said Special Referee dated December 9th, 1921, is reversed and that the cause was remanded for further proceedings in consonance with the opinion of the court.

(15) That said order of the District Court reversing said order of said Special Referee, A. P. Staples, Esquire, dated December 9th, 1921, is erroneous in matter of law, in that:

First. The District Court of the United States for the Western District of Virginia erred in reversing by its said order the said order of the Referee dated December 9th, 1921, adjudging and decreeing that the lien of the judgment of the Liberty National Bank was invalid as a secured or priority claim on the funds in the hands of your petitioner, but adjudging and decreeing that said claim should be allowed as an unsecured claim against the estates of W. L. Becker, Sr., and W. L. Becker, Jr., and the Roanoke Provision Company, which said order of said Referee sustained the objection of your petitioner as to the allowance of said claim as a secured or priority claim. The said District Court, by reversing the said order of the Referee and upholding the alleged lien of the Liberty National Bank, which was in error for the reason that on August 20th, 1920, [fol. 8] the firms of W. L. Becker & Company, and the Roanoke Provision Company, composed of W. L. Becker, Sr., and W. L. Becker, Jr., were adjudged bankrupts and by virtue of the filing of said petition and said adjudication, and further proceedings had in said matter before the Bankruptcy Court and the Referees thereof, and especially the filing by the said W. L. Becker, Sr., and W. L. Becker, Jr., of lists of their assets and liabilities in compliance with an order of the Referee, all of the property of W. L. Becker, Sr., and W. L. Becker, Jr., then became and was as of the date of the filing of the petition in bankruptcy of Runkle & Company, to-wit, August

6th, 1920, within and under the jurisdiction of the United States District Court for the Western District of Virginia, and became and was subject to administration in accordance with the Acts of Congress relating to bankruptcy under and by virtue of which acts no liens could be acquired and perfected on said individual properties, or the proceeds of sale thereof, which would be entitled to priority, or which could be proven as secured claims.

Second. The District Court of the United States for the Western District of Virginia erred in reversing the said order of the Referee dated December 9th, 1921, and thereby upholding the alleged lien of the Liberty National Bank, for the reason that by virtue of the appointment and qualification of your petitioner as Trustee of both partnership and individual estates, title to all of the property of both partnership and individual estates thereby became and was vested in your petitioner as Trustee, whose title thereto related back to the dates of the filing of said petition of Runkle & Company, to-wit, on August 6th, 1920, and no liens could be acquired or perfected thereon which would disturb or render inoperative the provisions of the Act of Congress relating to Bankruptcy and the administration of estates in bankruptcy. The effect of the said order of said District Court is to allow a lien to be perfected on the property of the bankrupts after said property became subject to the jurisdiction of the bankruptcy court.

Third. The District Court of the United States for the Western District of Virginia erred in reversing the said order of the Referee [fol. 9] dated December 9th, 1921, and thereby upholding as a lien the alleged judgment of the Liberty National Bank of Roanoke, Virginia, for the reason that said judgment had not been recovered four (4) months prior to the filing of the petition of Runkle & Company, to-wit, August 6th, 1920, and four (4) months prior to the said order of Referee, R. Q. Mosby, entered August 23rd, 1920, and that said judgment only became four months old prior to the filing of the individual voluntary petitions of W. L. Becker, Sr., and W. L. Becker, Jr., to-wit, April 27th, 1921, because litigation was pending in said District Court over the offer of composition filed in the cause, and that respondent bank is now attempting to take advavantage of the time consumed with litigation pending over said offer of composition.

Wherefore, your petitioner, feeling aggrieved because of the said order of the said District Court entered May 23rd, 1922, asks that the same may be revised in matter of law by your Honorable Court, as provided in Section 24-B of the Bankruptcy Law of 1898 and the rules and practices in such case made and provided.

James A. Bear, Trustee of the Estates of W. L. Becker, Sr., and W. L. Becker, Jr., Partners Trading as W. L. Becker & Company and the Roanoke Provision Company, and of the Individual Estates of W. L. Becker, Sr., and W. L. Becker, Jr.

STATE OF VIRGINIA,
City of Roanoke, To wit:

I, James A. Bear, Trustee of the Estates of W. L. Becker, Sr., and W. L. Becker, Jr., partners trading as W. L. Becker & Company and the Roanoke Provision Company, and of the individual estates of W. L. Becker, Sr., and W. L. Becker, Jr., the Petitioner named and described in the foregoing petition, do hereby make solemn oath that the statements of fact contained therein are true and correct to the best of my knowledge, information and belief.

James A. Bear, Trustees as Aforesaid.

[fol. 10] Subscribed and worn to before me this 30th day of May, 1922. Bessie W. Watkins, Notary Public. Jas. A. Bear, Hall, Wingfield & Apperson, Attorneys.

May 31, 1922. Appearance of Harvey B. Apperson is entered for the petitioner.

UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 2011

In Bankruptcy

[Title omitted]

NOTICE TO RESPONDENT TO DEMUR, ANSWER OR MOVE TO DISMISS

Issued May 31, 1922

On the Petition to Superintend and Revise, in Matter of Law, Proceedings of the District Court of the United States for the Western District of Virginia, at Roanoke

[fol. 11] To the Liberty National Bank of Roanoke, Virginia, a corporation, respondent:

Take Notice:

That you are required to demur, anwer or move to dismiss the petition to superiniend and revise, filed in this office in the above entitled cause on May 31, 1922, within fifteen days from this date, as required by Rule 36 of this Court.

May 31, 1922.

Claude M. Dean, Clerk U. S. Circuit Court of Appeals, Fourth Circuit.

Memorandum

A certified copy of the petition to superintend and revise, together with the original of the above notice annexed, were mailed to Jas.

D. Johnston, Esq., Roanoke, Virginia, Solicitor for Respondent on May 31, 1922.

Claude M. Dean, Clerk U. S. Circuit Court of Appeals, Fourth Circuit.

June 5, 1922, appearance of Jas. D. Johnston is entered for the respondent.

IN THE U. S. CIRCUIT COURT OF APPEALS

MOTION TO DISMISS PETITION TO SUPERINTEND AND REVISE—Filed June 10, 1922

Now comes the Liberty National Bank of Roanoke, Virginia, a corporation, the Respondent in the above entitled matter, and moves the court to dismiss the Petition to Superintend and Revise.

(1) Because no one of the errors complained of in said petition constitutes any ground to review and revise the decision of the District Court of the United States for the Western District of Virginia.

[fol. 12] (2) Because there is no error in the opinion of said District Court and no error in the order based on said opinion.

(3) Because Petitioner bases all his objections on the theory that the District Court of The United States for the Western District of Virginia, erred in not holding that the bankruptcy of the partnership dissolved the judgment recovered against the individual partners in their individual capacity. Respondent denies that the bankruptcy of the partnership, which is a separate entity, dissolved its judgment against the individuals, and says that its judgment against the individuals was more than four months old when said individuals were adjudged bankrupts.

(4) Because no proper or legal proceedings have been taken or had to avoid or discharge the lien of Respondent's judgment against said W. L. Becker, Sr., and W. L. Becker, Jr., individually. The objections filed by Petitioner against the allowance of Respondent's judgment as a secured debt do not allege that either W. L. Becker, Sr., or W. L. Becker, Jr., was insolvent at the time said judgment was recovered.

The Petition to Superintend and Review nowhere alleges that either W. L. Becker, Sr., or W. L. Becker, Jr., was insolvent at the time said judgment was recovered.

Nowhere in the proceedings is it alleged that W. L. Becker, Sr., and W. L. Becker, Jr., were insolvent at the time said judgment was recovered.

Respondent says that it is absolutely essential that Petitioner allege and prove by satisfactory evidence that W. L. Becker, Sr., and W. L. Becker, Jr., were insolvent at the time the lien of Respondent's judgment attached. Respondent says that Petitioner has neither alleged nor proven insolvency.

(5) Because "the order of adjudication of August 20th, 1920, declares the partnership to be a bankrupt, and distinctly failed to declare the individuals composing the partnership to be bankrupts," was not appealed from. "The refusal to adjudge the individuals composing the firm to be bankrupts was, if erroneous, an error which had to be appealed from within ten days from August the 20th, [fol. 13] 1920," and no appeal was taken.

Liberty National Bank of Roanoke, Virginia, By Jas. D. Johnston, Attorney.

STATE OF VIRGINIA,
City of Roanoke, To wit:

I, M. N. Ronald, a Notary Public in and for the City and State aforesaid, do certify that L. R. Tucker has this day personally appeared before me in my city and State aforesaid and made oath that he is cashier of the Liberty National Bank of Roanoke, Virginia, and the matters and things set forth in the foregoing motion to dismiss are true to the best of his knowledge and belief.

My commission expires on the 10th day of March, 1925.

Given under my hand this the 9th day of June, 1922.

M. N. Ronald, Notary Public.

IN U. S. CIRCUIT COURT OF APPEALS

DEMURRER TO PETITION TO SUPERINTEND AND REVISE—Filed June 14, 1922

The said Respondent says that the Petition to Superintend and Revise, is not sufficient in law, and for all that is stated in said Petition, the order of the District Court is clearly right. The grounds of demurrer relied on are as follows:

(1) Petitioner assigns as the first error that the District Court of the United States for the Western District of Virginia erred in not holding that the bankruptcy of the partnership ipso facto rendered null and void Respondent's judgment against W. L. Becker, Sr., and W. L. Becker, Jr., individually.

Respondent says that the partnership of W. L. Becker & Co., and the Roanoke Provision Co., were separate entities, and that said part- [fol. 14] nerships were so adjudged to be bankrupt as separate entities, and that the adjudication of these partnerships did not dissolve, nor render null and void Respondent's judgment against the individuals. Nor did the filing of the schedules of the individual assets affect Respondent's judgment.

Respondent says that its judgment against W. L. Becker, Sr., and W. L. Becker, Jr., individually was more than four months old when said parties were individually adjudged to be bankrupt.

(2) Respondent says that the Petitioner has neither averred nor proven that W. L. Becker, Sr., and W. L. Becker, Jr., individually was insolvent at the time the lien of its judgment attached, and that it is essential that Petitioner both allege and prove the insolvency of these parties individually, at the time the judgment attached.

(3) Respondent says that its judgment being against W. L. Becker, Sr., and W. L. Becker, Jr., individually could only be dissolved, or rendered null and void, by these parties being adjudged bankrupts individually within four months from the time the lien of said judgment attached against them individually, and then, only where it was alleged and proven that they were insolvent individually. Not all judgments recovered within even four months are dissolved or rendered null and void by bankruptcy, but only such as are alleged and proven to have been recovered when the party was either insolvent, or the party or parties to be benefited thereby had reasonable cause to believe the defendant was insolvent and in contemplation of bankruptcy.

None of the essentials for the dissolution of Respondent's judgment exist here.

(4) Respondent says that the petition to have the partnerships of W. L. Becker & Co., and the Roanoke Provision Co., adjudged bankrupts contained a prayer that both the partnerships and the individuals be adjudged bankrupts, but the order entered on said petition by the Judge of the District Court, distinctly failed and refused to adjudicate the individuals to be bankrupts.

Petitioner having failed to appeal from such order within ten [fols. 15 & 16] days cannot now be heard to complain. If Petitioner invokes the aid of said order for his purposes he will not be allowed to extend its operation beyond the limitations fixed thereon by the Judge of the District Court.

Wherefore this Respondent submits that its demurrer should be sustained and that the order of the District Court complained of in the Petition herein should be affirmed.

The Liberty National Bank of Roanoke, Va., By Jas. D. Johnston, Attorney.

STATE OF VIRGINIA,
City of Roanoke, To wit:

I, M. N. Ronald, a Notary Public in and for the City and State aforesaid, do hereby certify that Jas. D. Johnston, counsel for the Liberty National Bank of Roanoke, Virginia, has this day personally appeared before me in my city aforesaid and made oath that the foregoing demurrer is well founded in law, and I hereby certify that L. R. Tucker, cashier of said bank, has personally appeared before me in my city aforesaid and made oath that said demurrer is not interposed for delay.

My commission expires on the 10th day of March, 1925.

Given under my hand this the 13th day of June, 1922.

M. N. Ronald, Notary Public.

June 22, 1922, twenty-five copies of the printed record are filed.

[fol. 16a] IN U. S. CIRCUIT COURT OF APPEALS

STIPULATION AS TO ADDENDUM TO RECORD—Filed July 10, 1922.

It is hereby stipulated and agreed between counsel that, it appearing that page 30, paragraph 7, of the printed record in this case refers to certain lists of the individual assets and liabilities of W. L. Becker, Sr., and W. L. Becker, Jr., as being filed with the said printed record as exhibits therewith, but as a matter of fact, through inadvertence, said lists of individual assets and liabilities were not printed with the record, that said lists show:

(1) That in said list W. L. Becker, Sr., valued his individual assets at $23,500.00.

(2) That in said list W. L. Becker, Sr., scheduled the debts for which he alone was personally liable, some of which debts were secured by deeds of trust and some of which were not, at $5,372.25.

(3) That W. L. Becker, Sr., scheduled the debts for which he was liable, along with other makers and endorsers, a portion of which were secured by liens on the property owned by him and other parties, $3,900.00.

(4) That W. L. Becker, Sr., scheduled the debts of the partnerships of W. L. Becker & Company and the Roanoke Provision Company on which he was personally an endorser, at $27,066.05.

(5) That in said list W. L. Becker, Jr., valued his individual assets at $15,100.00.

(6) That in said list W. L. Becker, Jr., scheduled the debts for which he alone was personally liable, some of which debts were secured by deeds of trust and some of which were not, at $6,527.85.

(7) That W. L. Becker, Jr., scheduled the debts for which he was liable, along with other makers and endorsers, a portion of which were secured by liens on the property owned by him and other parties, at $3,900.00.

[fol. 16b] (8) That W. L. Becker, Jr., scheduled the debts of the partnerships of W. L. Becker & Company and the Roanoke Provision Company on which he was personally an endorser, at $27,066.05.

It is further stipulated and agreed between counsel that the sale of the entire assets of the partnership brought the sum of $908.08, which was the entire amount received from the sale of said assets; that the sale of the entire individual assets of W. L. Becker, Sr., brought the sum of $11,786.00, from which mortgage indebtedness of $2,708.36 was paid; and that the sale of the entire individual assets of W. L. Becker, Jr., brought the sum of $8,832.00, from which mortgage indebtedness of $3,257.68 was paid. And it is further stipulated between counsel that this stipulation shall be printed and considered as an addendum to the record in this cause,

both on the case to superintend and revise in matter of law and on the appeal.

Harvey B. Apperson, Attorney for Petitioner and Appellant.
Jas. D. Johnston, Attorney for Respondent and Appellee.

[fol. 16c] October 26, 1922, appearance of Jas. A. Bear is entered for the petitioner.

In U. S. Circuit Court of Appeals

Argument of Cause

November 17, 1922 (November Term, 1922), cause came on to be heard, together with No. 2016, before Woods and Waddill, Circuit Judges, and Rose, District Judge, and is argued by counsel and submitted.

United States Circuit Court of Appeals, Fourth Circuit

Filed December 21, 1922

No. 2011

In Bankruptcy

On Petition to Superintend and Revise, in Matter of Law, Proceedings of the District Court of the United States for the Western District of Virginia, at Roanoke.

[Title omitted]

Opinion

[fol. 16d] (Argued November 17, 1922; Decided December 21, 1922)

Before Woods and Waddill, Circuit Judges, and Rose, District Judge

James A. Bear and Harvey B. Apperson (Hall, Wingfield & Apperson on brief) for Petitioner, and James D. Johnston for Respondent.

Woods, Circuit Judge:

The issue of allowing or rejecting claim of a lien on the bankrupt's property is reviewable by appeal and not by petition to superintend and revise. The petition must therefore be dismissed. Coder v. Arts, 213 U. S. 223; Matter of Loving, 224 U. S. 183.

Dismissed.

UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 2011

[Title omitted]

[fol. 16e] On Petition to Superintend and Revise, in Matter of Law, Proceedings of the District Court of the United States for the Western District of Virginia

JUDGMENT—Filed and Entered December 22, 1922

This cause came on to be heard upon the petition and the motion of respondent to dismiss and the demurrer of respondent, and upon the transcript of record of the proceedings of the said District Court in the matter brought up for review, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the petition to Superintend and Revise, in this cause be, and the same is hereby, dismissed with costs.

It is further ordered that the Clerk of this Court transmit a certified copy of this judgment to the said District Court.

C. A. Woods, U. S. Circuit Judge. December 22, 1922.

IN U. S. CIRCUIT COURT OF APPEALS

PETITION OF RESPONDENT FOR STAY OF MANDATE—Filed January 13, 1923

The Respondent, by its counsel, James D. Johnston, Esq., represents unto the Court that it is its intention to apply to the Supreme Court of the United States for a writ of certiorari to this Court in the above entitled cause, and respectfully asks that the issuance of the mandate of this Court in the above case be stayed pending its application in the Supreme Court for said writ of certiorari.

Jas. D. Johnston, Counsel for Respondent. January 11th, 1923.

[fol. 16f] UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 2011

[Title omitted]

On Petition to Superintend and Revise, in Matter of Law Proceedings of the District Court of the United States for the Western District of Virginia, at Roanoke

ORDER STAYING MANDATE—Filed January 13, 1923

Upon the application of the Respondent, by its counsel, James D. Johnston, Esq., and for good cause shown.

It is ordered that the issuance of the mandate of this Court in the above entitled cause be, and the same is hereby, stayed pending the Respondent's application in the Supreme Court of the United States for a writ of certiorari to this Court, provided said application is presented in the said Supreme Court within 30 days from January 22, 1923.

C. A. Woods, U. S. Circuit Judge. January 13, 1923.

[fol. 17] **Transcript of Record on Appeal—Filed June 9, 1922**

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA, AT ROANOKE, VIRGINIA

In Bankruptcy

[Title omitted]

STIPULATIONS OF COUNSEL AS TO RECORD—Filed June 7, 1922

It is hereby stipulated and agreed by counsel of record that the transcript of the record on petition for appeal, filed in the above proceedings, shall consist of the following:

(On Petition to Review and Revise in Matter of Law)

(1) Petition of James A. Bear, Trustee, etc., to review and revise in matter of law, which said petition contains the assignments of error filed therewith.

(2) Notice to respondent to demur, answer, or move to dismiss petition.

(3) Demurrer, answer, or motion to dismiss petition.

[fol. 18] (On the Petition for Appeal)

(4) Petition of James A. Bear, Trustee, etc., on appeal, which petition contains the assignments of error filed with the same.

(5) Order granting appeal.

(6) Citation.

(7) Order of Adjudication of W. L. Becker, Sr., and W. L. Becker, Jr., partners trading as W. L. Becker & Company and the Roanoke Provision Company, dated August 20th, 1920.

(7a) Order of referee, R. Q. Mosby, dated August 23, 1920.

(8) Proof of claim of the Liberty National Bank against W. L. Becker, Jr., filed May 31st, 1921.

(9) Specifications of objections of James A. Bear, Trustee, to the allowance as a secured claim of the debt of the Liberty National Bank of Roanoke, Virginia.

(10) Summary of evidence of Referee and evidence transmitted therewith, which was taken on January 23, 1921, provided that it is stipulated and agreed between counsel that Exhibits numbers 1, 2, 3, 5 and 6 shall not be copied, as the contents of those Exhibits shall be governed by a certain agreed statement of facts between counsel, which is made a part of the record.

(11) Agreed Statement of Facts and proceedings taken from the record in this proceeding.

(12) Opinion of Special Referee, A. P. Staples.

(13) Order of Special Referee, A. P. Staples, dated December 9th, 1921.

(14) Petition for Appeal of Liberty National Bank from Order of Referee.

[fol. 19] (15) Petition for Review of Liberty National Bank from Order of Referee.

(16) Assignments of Error of Liberty National Bank to Order of Referee.

(17) Opinion of District Court of May 23rd, 1922.

(18) Order of District Court of May 23rd, 1922.

(19) It is stipulated and agreed that the foregoing transcript of record shall constitute the record to be printed in the case on petition to review and revise in matter of law, and the record to be printed in the case on appeal, except items numbers 5, 6, and 9 of the record in the case on appeal, which shall not be printed.

(20) It is further stipulated and agreed that any portion of the record in the case on appeal may be used in the case on petition to review and revise in matter of law, and vice versa.

(21) It is further stipulated and agreed that the transcript of the record in this matter on appeal and on the petition to superintend and revise shall be printed in accordance with the provisions of Rule 23 of the United States Circuit Court of Appeals.

Harvey B. Apperson, Attorney for Petitioner and Appellant.
Jas. D. Johnston, Attorney for Respondent and Appellee.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA

In Bankruptcy

In the Matter of W. L. BECKER & COMPANY, Trading Also as Roanoke Provision Co., a Partnership Composed of W. L. Becker and W. L. Becker, Jr., Alleged Bankrupt

ORDER—ADJUDICATION AND REFERENCE OF W. L. BECKER & CO., &C., AUGUST 20, 1920

At Roanoke, in said District, on the 20 day of August, A. D., 1920, [fol. 20] before the Honorable Henry C. McDowell, Judge of said Court in Bankruptcy, the petition of Runkle Co., Inc., et al., that W. L. Becker & Company, trading also as Roanoke Provision Co., be adjudged a bankrupt, within the true intent and meaning of the Acts of Congress relating to Bankruptcy, having been heard and duly considered, the said W. L. Becker & Company, trading also as Roanoke Provision Co., a partnership composed of W. L. Becker and W. L. Becker, Jr., is hereby declared and adjudged bankrupt accordingly.

And whereas, the said W. L. Becker & Company, trading also as Roanoke Provision Co., of Roanoke, in the County of Roanoke, and District aforesaid, on the 20 day of August, A. D., 1920, was duly adjudged a bankrupt upon a petition filed in this Court against him on the 6 day of August, A. D., 1920, according to the provisions of the Acts of Congress relating to Bankruptcy.

It is Therefore Ordered, that said matter be referred to R. Q. Mosby, Esq., one of the referees in bankruptcy of this Court, to take such further proceedings therein as are required by said Acts; and the said W. L. Becker & Co., trading also as Roanoke Provision Co., shall attend before said referee on the 21 day of August, A. D., 1920, at Roanoke, Virginia, and thenceforth shall submit to such orders as may be made by said referee, or by this Court, relating to said W. L. Becker & Co., trading also as Roanoke Provision Co., Bankruptcy.

——— ———.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA

[Title omitted]

ORDER OF R. Q. MOSBY, REFEREE, OF AUGUST 23, 1920

At Roanoke, in said District, Before R. Q. Mosby, Referee in Bankruptcy, Sitting as a Court of Bankruptcy

[fol. 21] Whereas, the above-named partnership was adjudicated a bankrupt on the 20th day of August, 1920, on an involuntary petition filed by Runkle & Company, Inc., et al.; and,

Whereas, said matter has been referred to the undersigned for further proceedings:

It is ordered that the above-named bankrupt be, and it is hereby, required to file in triplicate in the United States Clerk's Office, at Roanoke, Virginia, on or before the 2nd day of September, 1920, a complete list of its creditors (along with their post office address, giving street number or post office box number), together with the amount due each creditor of said partnership, and also a complete list of its assets, the said schedule of assets to be described fully, giving the location of same, in order to facilitate the appraisers to be appointed in said matter in making their report to the undersigned:

It is further ordered that W. L. Becker and W. L. Becker, Jr., or any other party or parties interested directly or indirectly in said partnership, be, and they are hereby, required to file with the undersigned referee on or before the aforesaid date a schedule of their respective creditors (along with their post office address, giving street number or post office box number), and a list of their individual assets, said schedule of liabilities and assets also to be filed in the United States Clerk's Office in triplicate.

It is further ordered that a copy of this order be mailed to W. L. Becker & Company and W. L. Becker and W. L. Becker, Jr., or in lieu thereof, that service of said order may be accepted by Horace M. Fox, Esq., counsel for said bankrupt, and the individual members composing same.

Given under my hand this the 23rd day of August, 1920.

R. Q. Mosby, Referee in Bankruptcy. Leg.

[fol. 25] EVIDENCE: EXHIBIT WITH PROOF OF CLAIM

In the Clerk's Office of the Corporation for the City of Roanoke, the 20th Day of July, 1921

THE LIBERTY NATIONAL BANK OF ROANOKE, VA., Plaintiff,

against

W. L. BECKER, W. L BECKER, JR., Partners trading as Roanoke Provision Company, W. L. Becker and W. L. Becker, Jr., Defendant.

Judgment obtained in favor of the plaintiff against the defendant at the July term, 1920, of the Corporation Court for the said City, in the sum of $5,566.05, with interest on $5,150.00, a part thereof, from the 15th day of June, 1920, until paid $5.00 Attorney's Fee and 5% Collection fee on sum of $5,150.00 "Homestead Waived" until paid and the costs, to-wit: $14.39.

Docketed J. L. D. 7, page 161.

Abstract of judgment.

Teste: R. J. Watson, Clerk.

EVIDENCE: EXHIBIT WITH PROOF OF CLAIM

VIRGINIA:

AT A CORPORATION COURT CONTINUED AND HELD IN AND FOR THE CITY OF ROANOKE, IN THE STATE OF VIRGINIA, AT THE COURTHOUSE THEREOF, ON THE 30TH DAY OF JULY, 1920.

THE LIBERTY NATIONAL BANK

v.

ROANOKE PROVISION CO et als.

This day came the plaintiff, by its attorney, and it appearing to the Court that the defendants have had due notice of this motion as required by law, that the same was filed in the Clerk's office of this court within the time required by law, that the defendants, though solemnly called, came not and the plaintiff having proven its claim [fol. 26] to the satisfaction of the court, it is therefore, considered by the court that the plaintiff, The Liberty National Bank of Roanoke, Va., do have and recover of the defendants, W. L. Becker, W. L Becker, Jr., partners as Roanoke Provision Company and W. L. Becker and W. L. Becker, Jr., the sum of $5,566.05, with interest on $5,150.00, a part thereof, from the 15th day of June, 1920, until paid, $5.00 Attorney's Fee and 5% Collection Fee on the sum of $5,150.00, and all of its costs in this behalf expended, upon an instrument in writing waving the Homestead Exemption.

A Copy—Test: R. J. Watson, Clerk.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA

[Title omitted]

OBJECTIONS OF J. A. BEAR, TRUSTEE, TO ALLOWANCE AS SECURED CLAIM DEBT OF LIBERTY NATIONAL BANK—Filed before Referee on Dec. 1, 1921

Now comes James A. Bear, Trustee in Bankruptcy of W. L. Becker, Sr., and W. L. Becker, Jr., partners trading as W. L. Becker & Company, and the Roanoke Provision Company, and as Trustee of W. L. Becker, Sr., and W. L. Becker, Jr., and objects to the allowance of the claim of the Liberty National Bank, a Corporation, of Roanoke, Virginia, as a secured or priority claim against the estates of W. L. Becker, Sr., and W. L. Becker, Jr., and says that the said claim is not entitled to priority in the distribution of the proceeds of the sale of either of these estates, nor is said claimant entitled to assert said claim [fol. 27] as a prior or secured claim on the property of either W. L. Becker, Sr., or W. L. Becker, Jr., or the proceeds of the sale of the property of either of them, and for his grounds of objection assigns the following:

(1) On August 20th, 1920, on the petition of Runkle & Company, a Corporation, and others, which was filed on August 6th, 1920, against W. L. Becker, Sr., and W. L. Becker, Jr., partners trading as W. L. Becker & Company and the Roanoke Provision Company, the said W. L. Becker, Sr., and W. L. Becker, Jr., partners trading as aforesaid, were, by the United States District Court for the Western District of Virginia, adjudicated bankrupts, and by virtue of the filing of said petition and said adjudication in bankruptcy, and by virtue of all further proceedings had in said matter before said court and the Referees thereof, and especially by virtue of an order entered in said proceedings on August 20th, 1920, by the Honorable P. Q. Mosby, then sitting in said matter as Referee, and the filing by the said W. L. Becker, Sr., and W. L. Becker, Jr., of the lists of their assets and liabilities all the property of the said W. L. Becker, Sr., and W. L. Becker, Jr., then became and was, as of the date of the filing of the said petition of Runkle & Company, within and under the jurisdiction of the United States District Court for the Western District of Virginia, and became and was subject to administration in accordance with the Acts of Congress relating to bankruptcy, under and by virtue of which Acts no liens could be acquired and perfected on said individual property, or the proceeds of the sale thereof, which would be entitled to priority, or which could be proven as secured claims.

(2) That by virtue of the appointment and qualification of the undersigned as trustee of both the said partnership and individual estates, title to all of the property of both partnership and individual estates thereby became and was vested in the undersigned trustee,

who has title related back to the date of the filing of said petition of Runkle & Company, a Corporation, and others, and no liens could be acquired or perfected thereon which would disturb or render inoperative the provisions of the Acts of Congress relating to bankruptcy and the administration of estates in bankruptcy.

[fol. 28] (3) That the judgment of the Liberty National Bank of Roanoke, Virginia, a corporation, now claimed to be a valid lien, had not been recovered four months prior to the filing of the petition of Runkle & Company and the said order of August 23rd, 1920, as is required by the Acts of Congress relating to bankruptcy before the same could be enforced as a lien, and that the said judgment only became four months old prior to the filing of the voluntary petitions of said individuals, because litigation was pending in said court over the offer of composition filed in the cause, and that said Bank is now attempting to take advantage of the time consumed with litigation pending over said offer of compensation.

(4) The proof taken in these proceedings shows that the debt evidenced by the judgment claimed to be entitled to priority against said individual estates, was in truth and in fact a partnership debt and the proceds of the note on which the judgment was obtained were in fact used for partnership purposes and not for the purposes of the individuals.

James A. Bear, Trustee in Bankruptcy. James A. Bear, Hall, Wingfield & Apperson, Attorneys for the Trustee.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA

[Title omitted]

SUMMARY OF EVIDENCE

On Petition of the Liberty National Bank of Roanoke, Va., for an Appeal and a Review of an Order Entered by Hon. A. P. Staples, Special Referee

(1) On July the 20th, 1920, the Liberty National Bank of Roa-[fol. 29] noke, Virginia, a corporation, recovered judgment in the Corporation Court for the City of Roanoke, Virginia, against W. L. Becker, and W. L. Becker, Jr., partners trading as the Roanoke Provision Co., and also against W. L. Becker and W. L. Becker, Jr., individually. It was duly docketed according to the statutes of Virginia, on July the 31st, 1920, in the Clerk's Office of said Corporation Court in Judgment Lien Docket No. 7, page 161. The judgment was for $5,566.05, with interest on $5,150.00, a part thereof, from the 15th of June, 1920, $5.00 attorney's fee and five per cent collection fee on $5,150.00 and $14.39 costs. This judgment was recovered on a note which waived the homestead exemption

made jointly by W. L. Becker and the Roanoke Provision Company, and endorsed by W. L. Becker and W. L. Becker, Jr., The Roanoke Provision Company was a partnership composed of W. L. Becker and W. L. Becker Jr.

Process was served on the partners and also on them as individuals, and the judgment was taken against the partnership and also against W. L. Becker and W. L. Becker, Jr., individually. Execution was issued on this judgment and came into the hands of the Sergeant of the City of Roanoke, Va., at three o'clock p. m. on August the 10th, 1920;

(2) On August 6th, 1920, an involuntary petition was filed in the Clerk's Office of the United States District Court for the Western District of Virginia, at Roanoke, against the two partnerships of W. L. Becker & Company and the Roanoke Provision Company, both of said partnerships being composed of W. L. Becker, Sr., and Jr. The petition recited that an act of bankruptcy was committed August the 4th, 1920, by the execution by the partnerships of a general deed of assignment conveying all their property to a trustee for creditors, the petition alleging that said partnerships were insolvent.

(3) On August 7th, 1920, W. L. Becker, Sr., and Jr., filed in the Clerk's Office of said Court their joint answer to said petition, waived process and admitted the allegations of the petition.

(4) On August 7th, 1920, a receiver was appointed for the part-[fol. 30] nerships and directed to take possession of certain but not all of the partnership assets.

(5) On August the 20th, 1920, the partnerships aforesaid of W. L. Becker & Company and the Roanoke Provision Company, were adjudicated bankrupts and they were directed to appear before R. Q. Mosby, Referee, on April 21st, 1920.

(6) On August 23rd, 1920, R. Q. Mosby, Referee, entered an order reciting the adjudication in bankruptcy of the partnerships and directed that they file in the Clerk's Office on or before the 2nd day of September a complete list of their creditors, with the amounts due each creditor of said partnerships and a list of the partnership assets, and order that W. L. Becker, Sr., and Jr., should file with said referee on or before September 2nd, 1920, a schedule of their individual creditors and the amount due each, and a list of their individual assets, and should likewise file a similar schedule of such creditors and assets in triplicate in the Clerk's Office of said Court. Counsel for W. L. Becker, Sr., and Jr., accepted service of said order.

(7) On August the 30th, 1920, the partnership bankrupts filed in said Clerk's Office in triplicate a list of their assets and liabilities, and on August —, 1920, W. L. Becker, Sr., and Jr., filed in said Clerk's Office and in the office of the Referee in Bankruptcy lists of their individual creditors and individual assets, as was required by the above order of the referee, and copies are filed herewith marked as exhibits.

The schedules filed for the partnerships show that the claim of the Liberty National Bank was reduced to judgment and docketed in Judgment Lien Docket No. 7, page 161.

Also the individual schedules filed in the Clerk's Office and in the office of the Referee by W. L. Becker, Sr., and Jr., in August, 1920, show that the debt of the Liberty National Bank for $5,556.05 wah reduced to judgment;

(8) On September the 25th, 1920, at an adjourned meeting of the creditors, the partnerships offered to their creditors a composi- [fol. 31] tion, which was filed in the Referee's office on that day. This printed composition offer contained the following language, among other things:

"No petition for bankruptcy has been filed by or against such individuals and no discharge of such individual debts so listed as individual debts is sought; aside therefore, from the fact that this deed of trust securing the advancement of the money offered in this composition to the partnership creditors will be upon the security of the individual estate assets, the rights of the individual creditors are not herein sought to be, and will not be, affected by this composition, if confirmed."

A vote was taken October the 12th, 1920, and on October the 20th, 1920, the Referee certified to the Judge his report and the evidence.

The Judge of the District Court declined to consider the offer of composition because the bankrupts had not made the proper deposit to cover the offer of composition, and all papers were returned to the United States Clerk's Office at Roanoke;

(9) On November 27th, 1920, W. L. Becker and Virginia E., his wife, W. L. Becker, Jr., and Edith C., his wife, conveyed to C. E. Hunter and R. B. Adams, Trustees, all of their individual real estate or interest in real estate, this deed of trust reciting among other things the following:

"Whereas, the partnership of W. L. Becker & Co., and Roanoke Provision Co., composed of W. L. Becker, Sr., and W. L. Becker, Jr., have been adjudged bankrupts by the United States District Court for the Western District of Virginia; and,

Whereas, said partners have made an offer of composition to their partnership creditors, by which they agree to pay the costs of the said bankruptcy, the preferred claims in full, and a dividend of twenty per cent upon the unsecured claims; and,

Whereas, the Mountain Trust Bank has agreed to advance the amount of money necessary for said composition, not to exceed the sum of $12,500.00, the said amount to be payable only in the event [fol. 32] of, and upon the confirmation of said composition."

The above deed of trust was put on the individual real estate of W. L. Becker, Sr., and Jr., without the consent of the Bankruptcy Court and without any effort being made to obtain such consent;

but at the time the offer of composition was made, on the 25th day of September, 1920, at the meeting of the creditors held on that day before R. Q. Mosby, Referee, counsel for the bankrupts stated before the Referee and the assembled counsel present, that the money which was to be paid to the creditors under the composition, if accepted, was to be advanced by the Mountain Trust Bank and would be secured by a deed of trust on the individual properties of the bankrupts.

Copies of said offer of composition, the order, giving notice thereon, as well as an amended offer of composition made on the 29th day of November, 1920, together with the order issued thereon, are filed herewith marked Exhibits one and two, respectively.

(10) On December 2nd, 1920, the bankrupt partnerships filed a petition for a meeting of creditors to act upon said amended offer, and the creditors' meeting was held on December the 23rd, 1920, at which a majority in number and amount of the creditors vested in favor of the composition, but the Liberty National Bank renewed the objection, which it had made on October 12th, 1920, to the composition, upon the ground that individual real estate could not legally be mortgaged and the proceeds distributed among partnership creditors. The bank asserted by counsel that it had a claim against the partnerships, and also against the individuals, and that it was prejudicial to the rights of the individual creditors to have individual assets mortgaged with which to raise the composition offered to partnership creditors;

On January the 3rd, 1921, the bank filed its objections in writing to the confirmation of the composition and the record was certified by the Referee to the Judges, which is the first pleading in the record whereby the bank asserted priority against the individual estates.

(11) On January the 6th, 1921, said bank filed its proof of debt [fol. 33] against W. L. Becker, Sr., and W. L. Becker, Jr., partners as the Roanoke Provision Co. A copy of this proof is filed herewith as Exhibit 3.

On January the 10th, 1921, the two partnerships of W. L. Becker & Co., and the Roanoke Provision Co., both of these partnerships being composed of W. L. Becker and W. L. Becker, Jr., petitioned for the confirmation of the amended offer of composition;

(12) On January the 12th, 1921, the Judge of the Court entered and order, designating February the 3rd, 1921, as the time for hearing on the objections to the composition, and the hearing was postponed by the Judge from time to time until April the 20th, 1921. On this date the Court entered an order sustaining the objections, and rejecting the composition, reciting in the order that the matter has come on to be heard upon the offer of composition and objection thereto by the Liberty National Bank.

(13) On April 27th, 1921, W. L. Becker, Sr., and W. L. Becker, Jr., filed their voluntary petitions in bankruptcy with the Clerk of

the Court with the required schedules, and on April 28th, 1921, they were adjudged bankrupts individually;

(14) On May 16th, 1921, James A. Bear was elected trustee for the two partnerships by the partnership creditors, and elected trustee for W. L. Becker, Sr., and W. L. Becker, Jr., by the individual creditors. At this meeting counsel for the Liberty National Bank stated that he desired the record to show that he did not vote for the bank in the selection of a trustee on the ground that said debt was a preferred debt, and the order entered by the Special Referee so shows that the bank declined to vote in the selection of a trustee.

(15) On May the 31st, 1921, the Liberty National Bank filed its two separate proofs of debt. One against W. L. Becker, Sr., individually, and the other against W. L. Becker, Jr., individually, with separate copies of the judgment obtained against these parties ind-vidually attached to the respective proof of debt, and copies of the order of Court in which judgment was entered up against [fol. 34] said parties. Copies of these proofs of debt with exhibits are filed as Exhibits 4, 5 & 6;

(16) These proofs allege that the partnerships were adjudged bankrupt on August the 20th, 1920, but the individuals were not adjudged bankrupts until April 28th, 1921, and that the judgment against these parties individually was then more than four months old, and was entitled to priority in the payment of the individual assets of W. L. Becker, Sr., and W. L. Becker, Jr.

(17) On August the 15th, 1921, James A. Bear, Trustee, for said individuals, sold the two residences and other real estate of these parties at public auction. The residence of W. L. Becker, Sr., was bought by his wife, Virginia E. Becker, at $9,950.00, and the residence of W. L. Becker, Jr., was bought by his wife, Edith C. Becker, for $6,575.00. Out of the first named sum is to be paid the mortgage indebtedness of $2,708.36, and out of the second sum the mortgage indebtedness of $3,257.68;

These two sales were confirmed on August the 24th, 1921. These two bankrupts had lived with their families in these two valuable residences continuously, without paying a cent of rent, though the trustee had proceeded after his election, with the administration of both partnership and individual estates;

(18) The partnership assets will not be sufficient to pay the partnership creditors, and the individual assets will not be sufficient to pay the individual creditors, if there is included their personal endorsements on partnership indebtedness;

(19) During the proceedings before the Special Referee, certain evidence was taken with a view of proving that the money loaned by the Liberty National Bank was used for partnership purposes, which evidence is herewith transmitted, from which the Referee finds that all, or substantially all, of the money which was loaned upon the notes given the Liberty National Bank, upon which its judgment was

obtained, was expended and used for partnership purposes, and that very little, if any, of said money was used for the individual purposes of W. L. Becker, Senior, or W. L. Becker, Junior. No sepa- [fol. 35] rate accounts of W. L. Becker, Senior, were kept, but such money as he obtained was deposited in the partnership account at the various banks where the partnership kept its accounts.

Given under my hand this 20th day of March, 1922.
Abram P. Staples, Special Referee in Bankruptcy.

Depositions

In the District Court of the United States for the Western District of Virginia

[Title Omitted]

At Roanoke in said District, on the 3rd Day of January, 1921, Before A. P. Staples, Special Referee in Charge

Depositions of W. L. Becker and W. L. Becker, Jr., Taken by Consent of Counsel to be Read in the Above-styled Cause.

Appearances: Horace M. Fox, Esq., Attorney for bankrupts; Col. Jas. D. Johnston, Attorney for the Liberty National Bank; Mr. R. H. Wilis, Esq., and Robert B. Adams, Attorneys for Mountain Trust Bank.

W. L. Becker, having been first sworn, deposes and says:

At the request of Col. Johnston the witnesses were separated during the examination.

[fol. 36] By Mr. Fox:

(Q.) Mr. Becker, the Liberty National Bank, of Roanoke, filed a proof of debt, and with it a certified copy of a note which was originally for $17,150.00 said note being signed, first by the Roanoke Provision Company, and by W. L. Becker and payable to W. L. Becker and W. L. Becker, Jr., and endorsed by them. Did W. L. Becker, personally, or W. L. Becker, Jr., personally, ever have a line of credit at the Liberty National Bank?

(A.) I had a line of credit there, and kept a business account there.

(Q.) I mean, did you have a line of borrowing credit there?

(A.) Yes, sir.

(Q.) When this loan was made to the Roanoke Provision Company, in whose account did the proceeds go?

(A.) The Roanoke Provision Company's.

Exception by Col. Johnston: The records of the bank, and the bank book of Mr. Becker, or W. L. Becker & Company, or the Roanoke Provision Company, would be the best evidence as to whose credit this money was placed.

(Q.) By whom was the proceeds of this loan expended?
(A.) By the Roanoke Provision Company.

Exception by Col. Johnston: The check stubs and cancelled books would be the best evidence as to how this money was spent, and the witness is called upon to produce the same.

(Q.) State whether or not this money was spent for the purposes of the Roanoke Provision Company, or was any of it spent for the individual benefit of W. L. Becker or W. L. Becker, Jr.?
(A.) Only for the business of the Roanoke Provision Company, and not a dollar of it, so far as I know, was spent for my personal benefit, or W. L. Becker, Jr.'s.

Objection by Col. Johnston: Question objected to as leading and suggesting the desired answer to the witness.

(Q.) Mr. Becker, when J. B. Stringfellow was appointed Receiver in this cause, were there delivered to him all of the bank [fol. 37] records and check stubs called for by Col. Johnston?
(A.) They were, so far as I know.
(Q.) And since that time, Mr. Stringfellow has had charge of your place of business, the keys, etc., so far as you know?
(A.) Yes, sir.
(Q.) Is this the same J. B. Stringfellow who makes oath to this proof of debt, as President of the Liberty National Bank?
(A.) Yes, sir.

Counsel for Bankrupt states, that the bank ledgers, showing to whom the money derived from this loan was passed into possession of, are in the posession of Co. Johnston's client, and can be produced by him if desired.

(Q.) Mr. Becker, on the back of this check is, as shown of 5/1/20, a credit of $500.00; and at 6/24/20 a credit shown of $500.00. I will ask whether or not, on these dates, the Roanoke Provision Company paid to this bank these two payments?
(A.) Yes, sir.
(Q.) Had any execution been levied by any officer on any of your household goods?
(A.) No, sir.
(Q.) Mr. Becker, how old are you?
(A.) 66 years old the 11th day of last month.
(Q.) Are you married, and is your wife living?
(A.) Yes, sir.
(Q.) How old is she?
(A.) 30.
(Q.) Mr. Becker, there are listed in the schedule filed by the bankrupt company, and also a schedule filed by you personally, a

number of notes. I will ask you to state whether or not all of these notes are on the regular bank forms, and also contain a waiver of homestead exemption?

(A.) Yes, sir.

Counsel of Liberty National Bank moves the Court to exclude all the foregoing questions and answers as being illegal and irrelevant and not waiving said exception, proceeds to cross examine the witness:

Cross-examination:

By Col. Johnston:

(Q.) Mr. Becker, who kept the books of the firm of W. L. Becker [fol. 38] & Company and the Roanoke Provision Company.

(A.) My son had charge of them.

(Q.) Who looked after the discounting of the papers of the firm, and the drawing of the checks?

(A.) My son drew most of the checks. I looked after the securing of the loans.

(Q.) What income did you have, aside from the business?

(A.) Did not have any, aside from my business, except rents from my property down here, which was later sold.

(Q.) When a note was discounted, who looked after the disbursing of the proceeds?

(A.) I did some of it myself, and so did my son.

(Q.) What salary did you allow yourself under the partnership business?

(A.) $150.00 per month.

(Q.) Was an account kept on the books of the partnership of yourself individually, and also of W. L. Becker, Jr., individually?

(A.) I think there was.

(Q.) Where is that account?

(A.) I don't know. Just a year or so ago we had a fire and lost every old record we had.

(Q.) What records were preserved from the fire?

(A.) Such books and business papers as we had in the safe.

(Q.) Would you kindly give a list of such to the stenographer?

(A.) No sir, I could not do that.

(Q.) Can you remember any of the books that were reserved from the fire?

(A.) Yes, our merchandise ledger, and maybe such check books as were not fully used up.

(Q.) What of your books were destroyed by the fire?

(A.) I could not tell you every one, but our records for several years were destroyed wholly.

(Q.) What do you include under the term of "records?".

(A.) I include every record of the business transactions, except those books as were saved.

(Q.) Do you include cancelled checks, and check stubs, as being destroyed?

(A.) Yes, sir.

(Q.) Do you include the record of the individual account of yourself and W. L. Becker, Jr.?

(A.) Yes, to a certain date, but I could not tell exactly the date. I don't mean every check, but just in a general way.

Q. I believe you, and W. L. Becker, Jr., together own a one-half interest in the block #21 Lots, with two houses on two [fol. 39] of these lots, near the Silk Mills, don't you?

(A.) Yes, In Belmont Hill, not near the Silk Mills tho.

(Q.) Where did you get the money with which you bought and paid for these lots?

(A.) I could not answer that question fully, but I know a portion of it was borrowed of the Mountain Trust Bank, and the balance was paid for in general business.

(Q.) You owed the Liberty National Bank, at one time, about $26,000.00, I believe?

(A.) Yes, sir.

(Q.) And, you were paying out of this money borrowed from the Liberty National Bank, the various individual demands of you, and W. L. Becker, Jr.?

(A.) I never had individual demands to amount to anything.

(Q.) You, and W. L. Becker, Jr., held your interests in the lots, above referred to, individually, I believe?

(A.) Yes, they were in our names. The deed was made to W. L. Becker and W. L. Becker, Jr.

(Q.) And, you used part of the money you got from the Liberty National Bank to pay these individual demands from it?

(A.) No, I don't know that at all.

(Q.) You are not prepared to say that you did not use the money in that way?

(A.) No, sir, but it was a very small portion, if any at all, used. I could, of course, not say the exact amount.

(Q.) As a matter of fact, you took out of your business, and out of your money, wherever you had it, to pay the demands upon you—did you not?

(A.) Certainly.

(Q.) And, you were not undertaking to separate your funds, and say that some should go exclusively to pay one part, and some another?

(A.) To a certain extent I did.

(Q.) But you have no account showing where any distinction of that case was kept?

(A.) I don't know about that. If I could see the old check books I might tell. If you are driving at the fact that I used any of this money for my bersonal benefit, I did not do it.

(Q.) How much did W. L. Becker, Jr., pay on his residence?

(A.) That is his matter, for I don't know. He can answer that for himself.

(Q.) Have you no idea?

(A.) No, sir.

(Q.) Do you know where he got the money he paid on his residence?

(A.) No. I know where he got $1,500.00 of it, as I endorsed his note at the First National Bank for it. That is all I can tell you.

[fol. 40] (Q.) And, you say you have no individual income, or source of individual income, except from rents from property Won't you kindly give a list of all property from which you derive an individual income, and a list of any other securities from which you derive an individual income, since the date of your first indebtedness to the Liberty National Bank.

(A.) The only source of income, outside of my salary and the profits of W. L. Becker & Company, was rents from a building on Holliday Street.

(Q.) Mr. Becker, did you personally superintend the disbursement of all the money, or any part of it, and if so, what part of it, that you borrowed from the Liberty National Bank.

(A.) Not all of it, but a part of it.

(Q.) Will you kindly file with the Referee an account, showing the sums that you disbursed, and the dates, and to whom paid, out of this money derived from the several loans made you by the Liberty National Bank?

Objection by Mr. Fox: The witness has stated that all the records, bank books, and account books, of these two concerns were turned over last August to the Receiver in this cause. It is absolutely impossible for him to make up a list from papers which he does not have in his possession, but are in the possession of the Court.

Counsel for Bank replies that the Receiver is an officer of the United States Court, and the Special Referee is requested to enter an order, if necessary, directing the Receiver to allow the witness to inspect any, and all, books and papers as he may need in order to make up the statement requested.

(Q.) As a matter of fact, Mr. Becker, you don't know with any degree of accuracy, what was done with the $26,000.00 that was borrowed from the Liberty National Bank?

(A.) Yes, I know to this extent. So far as I am aware, none of this money was spent for the personal use of W. L. Becker.

(Q.) How can you know this, unless you are able to see to whom the money was paid?

(A.) Just like we know the sun is shining, and we can't see it. On that same principal.

[fol. 41] (Q.) Where did you get the money that you paid your salary, and W. L. Becker, Jr.'s, from?

(A.) From the profits of W. L. Becker & Co., and the Roanoke Provision Company profits.

(Q.) Do you mean to tell the Court that you drew no checks on the account of W. L. Becker & Company and the Roanoke Provision Company, at the Liberty National Bank, to pay the salaries of the firm?

(A.) I did not say that. I mean the principal part of it came from the two sources I mentioned.

(Q.) Where did you get the money that you paid on the lots above referred to, as being in Belmont?

(A.) As I stated awhile ago, I could not tell you where all this money came from, but so far as the bank was called on to pay the balance I don't know.

(Q.) You are not prepared to say that none of the money that went to pay on these lots came out of the account at the Liberty National Bank?

(A.) Not to my knowledge.

(Q.) Where did it come from then?

(A.) Some of it might have come out of it, but the bulk of it came from other sources.

(Q.) W. L. Becker, Jr., was also drawing on the firm account, at the Liberty National Bank to pay his salary, wasn't he?

(A.) I don't know about that.

(Q.) You are not prepared to say that he did not?

(A.) No, sir.

(Q.) You are not prepared to say that W. L. Becker, Jr., did not get, out of this fund, the money he paid on his residence?

(A.) My recollection about the transaction of his residence is this: That he paid $1,500.00, and assumed a loan on it, and that $1,500.00 was borrowed at the First National Bank, and I went on his note for it. There was a loan on it, held by Mr. Lambert at Bedford, which was afterwards transferred to the First National Bank, and I think the same loan is still on.

By Mr. Fox:

(Q.) Mr. Becker, you had, up to some time ago, owned a piece of property on Holiday Street?

(A.) Yes, sir.

(Q.) I believe you first obtained a loan on this property, and then sold it?

(A.) Yes, sir.

(Q.) State whether or not the proceeds of either this loan, or the [fol. 42] sale, went into the purchase of any other of this real estate of which you have acquired?

(A.) $9,000.00 from the sale of that property was paid to the Liberty National Bank; $10,000.00 was paid into the general business, and some of it into this Southeast property, I don't know what amount.

(Q.) Was the $9,000.00 credit, shown on this note as of 3/19/20, the proceeds of the sale of your personal individual property on Holiday Street?

(A.) Yes, sir.

(Q.) And, do I understand you also to state that the $10,000.00 derived from a loan on this Holiday Street property, was put into the partnership account, and used for partnership purposes, or any part thereof?

(A.) Yes, sir, a portion of it was. Some of the money, however, was paid to the Liberty National Bank to *curtain* the note, and the balance was placed to the credit of W. L. Becker & Co.

(Q.) Was the Liberty National Bank paid any part of the money you all received for your fire insurance?

(A.) I think every dollar of it was paid to the Liberty National Bank.

By A. P. Staples, Referee:

(Q.) Mr. Becker, were the moneys that you derived from the sale of your property, and other individual assets, paid into the general partnership funds?

(A.) Yes, either for W. L. Becker & Company or the Roanoke Provision Company.

(Q.) Were your partnership funds, and individual funds, more or less commingled in your partnership account?

(A.) They were, more or less.

(Q.) Do you think that the real estate, which you and your son have listed in your individual schedule, was indirectly acquired from the proceeds of your business?

(A.) Yes, sir.

By Col. Johnston:

(Q.) Your residence was purchased in what year?

(A.) The lot was bought in 1901, and the house built in 1902, as I remember.

(Q.) When did you make the loan from the Liberty National Bank first?

(A.) June, 1918, the Liberty National Bank was organized. It was soon after that.

[fol. 43] W. L. Becker, Jr., having been duly sworn, deposes and says:

By Mr. Fox:

(Q.) Mr. Becker, there are scheduled in the partnership schedule, and in your individual schedule, a number of notes. I wish you would state whether or not all of these notes were on the regular printed bank forms, and contain the usual provision of waiving the homestead?

(A.) Yes, sir.

(Q.) What is your age?

(A.) I am 34, and my wife is 32.

(Q.) Has any execution been levied by any officer on judgments, especially upon the judgment of the Liberty National Bank on your household properties?

(A.) No, sir.

(Q.) The Liberty National Bank filed and exhibited with its proof of debt, a note for $17,150.00, dated September 22nd, 1919, on which are shown a number of credits. Was this a renewal note of a

former indebtedness, and if so, when did the Roanoke Provision Company obtain a line of credit from the Liberty National Bank?

(A.) That was a renewal note, and a line of credit was gotten from the Liberty National Bank pretty soon after they went into business.

(Q.) Shortly after June, 1918?

(A.) Yes, sir.

(Q.) Do you recall what the amount of the original note was for?

(A.) I do not know.

(Q.) Was it more than the $17,150.00?

(A.) No, that is not the first note.

(Q.) Between the date of the first credit that you obtained from the bank, and the date of this note, had your indebtedness, at any time, been larger than this?

(A.) Yes, sir.

(Q.) To whom was this loan made?

(A.) To the Roanoke Provision Company.

(Q.) Mr. Becker, in what business, and for what purposes, were the proceeds for this loan used?

(A.) The proceeds of that note we used in the business, for the purpose of paying obligations of the Roanoke Provision Company.

(Q.) Was any of this money used for the personal individual [fol. 44] benefit of W. L. Becker or W. L. Becker, Jr.?

(A.) No, sir.

(Q.) You purchased a home sometime ago, do you remember the date?

(A.) 1914.

(Q.) Were any of the proceeds of the loan from the Liberty National Bank used for that home?

(A.) No, sir.

(Q.) You and your father purchased a one-half undivided interest, being a one-fourth interest each, in about twenty lots on Belmont Hill, and you purchased one lot individually. Do you recall about how long ago that was?

(A.) It was either 1915 or 1916.

(Q.) Did you and your father pay for those lots in full?

(A.) Yes, sir.

(Q.) Did the proceeds of this loan from the Liberty National Bank go into the purchase of these lots in Belmont Hill?

(A.) No, sir, I don't think so.

(Q.) Do you recall whether or not these lots had been first paid prior to June, 1918, when the Liberty National Bank was organized?

(A.) I can't recollect.

(Q.) It is material for the Court to know if, as a matter of fact, any of the proceeds of this loan went into these lots, and I will ask you to make an examination, as you can, of any of the existing records and report to the Referee what you find.

———.

(Q.) Did you have charge of the larger portion of the checking business for the Roanoke Provision Company, and the W. L. Becker & Company?

(A.) Yes, sir.
(Q.) You also had charge of the books?
(A.) Yes, sir.

By Col. Johnston (after making objections on page #14-A):

(Q.) Where are the cancelled checks, and check stubs, on the Liberty National Bank of W. L. Becker & Company and the Roanoke Provision Company?
(A.) I could not tell you. A good many were destroyed in the fire.
(Q.) What part of them were destroyed in the fire?
(A.) I am unable to say.
(Q.) Where are those that were not destroyed?
(A.) All that I know of are in the building at #375 Salem Ave.
(Q.) Did you keep an individual account for yourself and your father?
(A.) What do you mean?
[fol. 45] (Q.) Did you have, on the partnership books, an account for you and your father?

Counsel of Liberty National Bank moves the Court to exclude all the foregoing questions and answers as being illegal and irrelevant, and not waiving said exceptions, proceeded to cross examine the witness, as on page #14.

(A.) Yes, sir.
(Q.) Where is that record?
(A.) In the same building.
(Q.) How much did you get a month out of the partnership?
(A.) Had a drawing account of no specified amount each month.
(Q.) How much did you usually draw?
(A.) $200.00 or $250.00 per month.
(Q.) Did your father have a salary?
(A.) He worked it the same way.
(Q.) How much did he draw?
(A.) I would not attempt to say.
(Q.) What, according to your best recollections?
(A.) I think I have answered that question.
(Q.) Did you draw the checks to pay his salary?
(A.) — say about the same, altho I don't know.
(Q.) Did you draw the checks to pay his salary?
(A.) Not always.
(Q.) How frequently did you draw those checks?
(A.) I can't tell you.
(Q.) Can you recall the amount paid him at any time?
(A.) No, sir, I can not.
(Q.) What do you value your residence at?
(A.) I don't know what I could get for it if I had to sell it, but I think it is worth $10,000.00 now.
(Q.) Are there any mortgages against this property, and if so, how much?

(A.) There is one mortgage of $3,000.00 principal.
(Q.) What is the size of the lot on which your residence is built?
(A.) 60 feet wide, by 200 feet long.
(Q.) This lot is located on what street, and what part of Roanoke?
(A.) On Broadway, in South Roanoke.
(Q.) Could you file with the Referee a statement, showing the various sums borrowed from the Liberty National Bank, and how the [fol. 46] proceeds were disbursed?
(A.) I will make an effort to do so.
(Q.) What is your father's residence valued at?
(A.) I could not tell you.
(Q.) Do you know what mortgage indebtedness there is against it?
(A.) I am not positive, but I think it is $2,500.00.
(Q.) Is his residence worth more or less than your residence?
(A.) I can not say.
(Q.) You were asked by Mr. Fox whether any of the money borrowed from the Liberty National Bank went to pay for the Belmont lots. When did you make the last payments on these lots?
(A.) I am not positive.
(Q.) Did you make a payment on these lots in 1920?
(A.) Can't say.
(Q.) Who composed the partnership of W. L. Becker & Company?
(A.) W. L. Becker and W. L. Becker, Jr.
(Q.) Who composed the partnership of the Roanoke Provision Co.?
(A.) W. L. Becker and W. L. Becker, Jr.

By Mr. Fox:

(Q.) You filed a schedule of the personal liabilities, which you distinguished from the partnership liabilities, with the Referee, did you not?
(A.) Yes, sir.
(Q.) Have all of your individual creditors, listed as such on your individual schedule of liabilities, filed with the Referee in this case, executed a writing whereby they have consented to you giving a Deed of Trust on your individual real estate, along with your father on his individual real estate, to secure the $12,500.00 to the Mountain Trust Bank, which sum is the amount offered in payment of the composition in this cause, except from this cause, however, the First National Bank?
(A.) Yes, sir.
(Q.) Is the original of this writing in the possession of the Mountain Trust Bank?
(A.) Yes, sir.

Thereupon, Mr. R. H. Willis stated that he would file with the Referee, as a part of this deposition, a true and correct copy of said agreement.

(Q.) State whether or not the First National Bank, as subsequent [fol. 47] to these proceedings, accepted a renewal of your personal note?

(A.) They have.

(Q.) Have the individual creditors, as shown by the schedule filed with the Referee, of W. L. Becker, Sr., signed a similar waiver, and is it also in the possession of the Mountain Trust Bank, except the claims of B. C. Mosby?

(A.) Yes, sir.

Mr. R. H. Willis, Counsel for the Mountain Trust Bank, states for the Referee, that he will exhibit the original to Col. Johnston, and file a true and correct copy with the Referee, as part of this deposition.

By Mr. Johnston:

(Q.) I hand you a note, held by the Liberty National Bank, for $17,150.00, dated September 22nd, 1919, which is certified by R. J. Watson, Clerk, as being a copy of the original note on file in his office and ask you if you are W. L. Becker, Jr., who endorsed said note?

(A.) I am W. L. Becker, Jr., and I have endorsed a note at the Liberty National Bank, but not having in my hand the original, I am unable to say whether my name is on the note until I can see it.

W. L. Becker, Sr., recalled:

By Col. Johnston:

(Q.) What is the value of your residence, and what mortgage is upon it?

(A.) I would not attempt to value it. The mortgage is $2,500.00.

(Q.) Mr. Becker, you state that you would not undertake to value your residence. Have you no value on it?

(A.) No, sir.

(Q.) Is it worth $10,000.00?

(A.) I should say it was.

(Q.) Is it worth at least $10,000.00? Do you think?

(A.) I don't think at all.

(Q.) When you came to make up your schedule, what did you think of it then?

(A.) Whatever that schedule says.

(Q.) How could you put a value on it at the time you make up the schedule, but decline now?

(A.) I just simply had not thought about it. The market conditions were unsettled.

[fol. 48] (Q.) I am asking the value of it?

(A.) If I were in a position to sell it this evening, I would not know what to ask for it.

Depositions taken by A. J. Hiatt. Fee, —.

In United States District Court

Agreed Statement of Facts Taken From the Record—Filed June 7, 1922

It is hereby stipulated and agreed between counsel of record in this case, on appeal and on petition to superintend and revise:

(1) That Respondent and appellee Bank filed on January 6th, 1921, proof of claim against W. L. Becker, Sr., and W. L. Becker, Jr., partners trading as the Roanoke Provision Company, and likewise filed proof of claim against W. L. Becker, Sr., individually, on May 31st, 1921, and against W. L. Becker, Jr., individually on May 31st, 1921, and that the allegations of the proof of claim against W. L. Becker, Sr., are the same as the allegations contained in the proof of claim filed against W. L. Becker, Jr., which is to be printed with the record, and the proof against the Roanoke Provision Company, while against the partnership alone, alleges that W. L. Becker, Sr., and Jr., "in their individual capacity are not bankrupts, and that no petition has been filed against them to have them adjudged bankrupts, and that as individuals they are not insolvent."

(2) That on December 1st, 1921, James A. Bear, Trustee, filed with A. P. Staples, Special Referee, his specifications of objections in writing to the allowance of the claim of the Liberty National Bank as a secured or priority claim. The statement and allegations of said specifications of objections are the same as the statements and allegations of the petition of said Trustee for an appeal in this case, [fol. 49] which is printed under paragraph 9 of the stipulation of counsel as to record.

Harvey B. Apperson, Attorney for Petitioner and Appellant.
Jas. D. Johnston, Attorney for Respondent and Appellee.

In U. S. District Court

Opinion of Referee

The Claimant Bank contends that the partnership bankruptcy, even though occurring within four months of the rendition of its judgment against the individuals composing the partnership yet does not affect the lien of the judgment upon the individual estates.

On the other hand the Trustee contends that said judgment is a preference and the lien thereof, even upon the individual estates, is avoided under Section 67-F by the filing of the partnership petition within the four months' period.

No case has been found deciding the precise point here raised, nor are the authorities in accord upon the general principles involving the administration of partnership and individual estates where only the firm is in bankruptcy; for since the filing of the individual petitions came too late here to render the bank's judgment a preference,

it would seem that the question here must be decided upon the principles which would apply if the individuals had not filed petitions.

There is no longer any doubt that the partnership bankruptcy requires the administration by the bankruptcy court of the individual estates as well as of the partnership estates. Francis vs. McNeal, 228 U. S. 702.

But is the bankruptcy court to distribute the individual estates among the individual creditors according to the principles of the bankruptcy act, or according to state law, just as though there was no bankruptcy? The answer to this questiion has not been found in the decided cases. It would seem to depend largely upon the extent to which the doctrine is to be carried that a partnership is a separate entity from the individuals composing it. One line of cases, [fol. 50] following in Re Bertenshaw, 85 C. C. A. 61, unquestionably carry the entity doctrine too far, as the supreme court held in Francis vs. McNeal, supra, referring particularly to the Bertenshaw case. The erroneous conclusions of these cases appear to have resulted from what the supreme court has held to be a misconception of the purpose and meaning of Section 5-H of the Act, which is as follows:

"In the event of one or more but not all of the members of a partnership being adjudged bankrupt, the partnership property shall not be administered in bankruptcy, unless by consent of the partner or partners not adjudged bankrupt; but such partner or partners not adjudged bankrupt shall settle the partnership business as expeditiously as its nature will permit, and account for the interest of the partner or partners adjudged bankrupt."

In the Bertenshaw case this section was improperly construed to mean that when the partnership and some but not all the partners are in bankruptcy the court acquires no jurisdiction over the individual estates; and this case also recognizes the now clearly erroneous theory that the partnership, as a separate entity, can be bankrupt, though one or more of the partners be solvent.

Thus, the erroneous principles of the Bertenshaw line of cases have been followed and expanded by other courts until now it cannot be said from the decisions what rules are properly applicable to a partnership bankruptcy, or whether, in fact, the adjudication of the partnership as bankrupt does not necessarily carry with it the adjudication of the individual partners as well. In Re Forbes, 128 Fed. 137.

Since the partnership adjudication can only be had upon the insolvency of the firm and all the partners and requires the individual partners to file individual schedules of their separate assets and liabilities, and gives the court jurisdiction to administer the individual as well as the partnership estates, it may well be asked what change is wrought or additional jurisdiction conferred by the filing of individual petitions? In Francis vs. McNeal, supra, Mr. Justice Holmes says:

[fol. 51] "Since Cory on Accounts was made more famous by Lindley on Partnership, the notion that the firm is an entity distinct from its members has grown in popularity, and the notion has been confirmed by recent speculations as to the nature of corporations and the oneness of any somewhat permanently combined group without the aid of law. But the fact remains as true as ever that partnership debts are debts of the members of the firm, and that the individual liability of the members is not collateral like that of a surety, but primary and direct, whatever priorities there may be in the marshaling of assets. The nature of the liability is determined by the common law, not by the possible intervention of the bankruptcy act. Therefore ordinarily it would be impossible that a firm should be insolvent while the members of it remained able to pay its debts with money available for that end. A judgment could be got and the partnership debt satisfied on execution out of the individual estates."

"The question is whether the bankruptcy act has established principles inconsistent with these fundamental rules, although the business of such an act is, so far as may be, to preserve, not to upset, existing relations. It is true that by Section 1, the word 'persons,' as used in the act, includes partnerships; that by the same section, a person may be deemed insolvent when his property, exclusive, etc., shall not be sufficient to pay his debts; that by Section 5a, a partnership may be adjudged a bankrupt, and that by Section 14a any person may file an application for discharge. No doubt these clauses, taken together, recognize the firm as an entity for certain purposes, the most important of which, after all, is the old rule as to the prior claim of partnership debts on partnership assets, and that of individual debts upon the individual estate. Section 5g. But we see no reason for supposing that it was intended to erect a commercial device for expressing special relations into an absolute and universal formula,—a guillotine for cutting off all the consequences admitted to attach to partnerships elsewhere than in the bankruptcy courts. On the contrary, we would infer from Section 5, clauses a through g, that the assumption of the bankruptcy act was that the partner-[fol. 52] ship and individual estates both were to be administered, and that the only exception was that in h, "in the event of one or more, but not all, of the members of a partnership being adjudged bankrupt." (30 Stat. at L. 548, Chap. 541, U. S. Comp. Stat. 1901, p. 3424.)"

"In that case, naturally, the partnership property may be administered by the partners not adjudged bankrupt, and does not come into bankruptcy at all except by consent. But we do not perceive that the clause imports that the partnership could be in bankruptcy and the partners not. The hypothesis is that some of the partners are in, but that the firm has remained out, and provision is made for its continuing out. The necessary and natural meaning goes no further than that."

"On the other hand, it would be an anomaly to allow proceedings in bankruptcy against just debtors from some of whom, at any time before, pending, or after the proceeding, the debt could be collected in full. If such proceedings were allowed, it would be a further

anomaly not to distribute all the partnership assets. Yet the individual estate, after paying private debts, is part of those assets, so far as needed. Section 5f. Finally it would be a third incongruity to grant a discharge in such a case from the debt considered as joint, but to leave the same persons liable for it considered as several. We say the same persons, for, however much the difference between firm and member under the statute be dwelt upon, the firm remains at common law a group of men, and will be dealt with as such in the ordinary courts for use in which the discharge is granted. If, as in the present case, the partnership and individual estates together are not enough to pay the partnership debts, the rational thing to do, and one certainly not forbidden by the act, is to administer both in bankruptcy. If such a case is within Section 5h, it is enough that Francis never has objected to the firm property being administered by the trustee.

"If it be said that the logical result of our opinion is that the partners ought to be put into bankruptcy whenever the firm is, as held by the late Judge Lowell, in an able opinion (Re Forbes, 128 Fed. 137), it is a sufficient answer that no such objection has been taken, but, on the contrary, Francis has consented and agreed to [fol. 53] hand over his property according to the order of the court. So far as Vaccaro vs. Security Bank, 43 C. C. A. 279, 103 Fed. 436, 442, is inconsistent with the opinion of the majority in Re Bertenshaw, 17 L. R. A. (N. S.) 886, 85 C. C. A. 61, 157 Fed. 363, 13 Ann. Cas. 986, we regard it as sustained by the stronger reasons and as correct."

Thus this implied approval of the principles announced in the Forbes case, supra, may be said to leave it an open question whether the adjudication of the partnership as bankrupt is not also an adjudication of the individual partners.

See also, In Re Stokes, 106 Fed. 312.

But assuming that the individuals, apart from the partnership, are not in bankruptcy by virtue of the adjudication of the firm, the individual estates clearly are. And if the partnership bankruptcy draws into the bankruptcy court the individual estates for distribution does it not at the same time bring these estates within the influence of the rules prescribed by the bankruptcy act by which this distribution is to be made? The act is dual in its operation. On the one hand, it operates in rem, providing for the distribution of the estate according to well defined principles; on the other hand it operates in personam granting the persons adjudged bankrupt a discharge from their debts. If it can be said that in order to invoke the latter function and receive a discharge individuals composing a partnership must file separate individual petitions, nevertheless it is clear that the former, i. e., the right and duty to distribute the individual estates, results from the partnership adjudication.

And not only does the act confer this jurisdiction, but it provides for how the several estates are to be administered. This clause 5-G says:

"The Court may permit the proof of the claim of the partnership estate against the individual estates, and vice versa, and may marshall the assets of the partnership estate and individual estates so as to prevent preferences and secure the equitable distribution of the property of the several estates."

[fol. 54] This provision would seem to bring the individual estates within the same rules as to preferences and equitable distribution as the partnership estates; it certainly makes no express distinction between them. And I have been unable to find in the entire act any provision which would admit of the conclusion that the partnership adjudication, though bringing the distribution of the individual estates within the scope of the bankruptcy proceedings, yet does not, at the same time, require the administration of those estates upon the basic principles of the act. Where the estate is, by express terms, drawn into the proceedings for complete distribution, it would seem to require some express provision to negative the natural inference that this distribution is to be made in accordance with the cardinal principles laid down by the act. There being no such provision, in my opinion the Trustee's title to the individual estates relates back to the filing of the partnership petition and as the Bank's judgment was recovered within four months of that time the lien thereof is annulled.

And this conclusion is supported by the principles applied by the Supreme Court's decision in the case of Miller vs. New Orleans Acid and Fertilizer Company, 211 U. S. 496. In that case one of the individual members of a partnership had, out of his individual estate, paid defendant Miller a debt in full. Under the Louisiana State law this was a preference which, not only individual, but partnership creditors as well, might set aside. Three partnership creditors brought a bill to recover the sum paid, invoking this law of the state, under which these three creditors were given a lien upon the fund when recovered. More than four months after the debt had been paid Miller, but within four months of the institution of the suit to set it aside, the partnership was adjudged bankrupt, though the individual partners were not. The Trustee, as permitted by Section 67-F of the bankruptcy act, was substituted plaintiff in place of the three partnership creditors, and continued to prosecute in the state court for the benefit of the bankrupt estate, the suit to enforce the lien acquired by the original plaintiffs upon the fund paid Miller.

The highest state court having held the payment a preference under state law, Miller carried the case by writ of error to the Fed-[fol. 55] eral Supreme Court. One of the principle questions there raised was whether the partnership trustee could complain of the payment in full of a partner's individual debt out of his individual estate, since under the method of distribution prescribed by the bankruptcy act, the individual creditors must be paid in full before any of the individual estate could be diverted to partnership debts.

The Court held:

1. That though under the Louisiana law, the partnership creditors shared with the individual creditors in the distribution of the partner's individual estate, this rule was superseded by the adjudication of the firm in bankruptcy, and the provisions of the bankruptcy act covering this subject were controlling; and

2. That the state court rightly held the Trustee entitled to recover this fund for the benefit of other individual creditors of the partner, if there should be any, and that the method of distribution of this fund among the individual's creditors, was solely for the bankrupt court to determine.

But the court said that "On proof of the claims against such individual estate, if it be that Miller is the only individual creditor, he will be entitled, by way of distribution, to the full amount paid in by him because of the method of distribution ordained by the bankrupt law."

Thus, the right of the partnership Trustee in this case to recover the fund was sustained, not for any benefit which could accrue to the partnership estate, but solely for the benefit of other individual creditors; nor was the trustee entitled to enforce the lien of the three partnership creditors for the benefit of the partnership estate, to the detriment of the individual creditor. And the court further held that this lien of the three partnership creditors on this fund (part of the individual estate), was avoided upon the filing of the bankruptcy petition within four months, though it was not shown that [fol. 56] other partnership creditors would be prejudiced if those three were allowed to enjoy their lien.

As applied to the question before us, it may be said that the foregoing case decides that if a partnership creditor obtains a lien upon the estate of an individual partner, within the four months' period, this lien is a preference if it interferes, in any way, with the method of distribution fixed by the act, and will be set aside, even though the enrichment of the partnership creditors who obtain the lien is solely at the expense of individual creditors.

It seems to be a logical conclusion, therefore, from what this case decides, that though the partners are not in bankruptcy, separately from the firm, nevertheless the manner and method of distribution of their individual estates among the individual creditors, and these creditors' rights, inter esse, are controlled by the bankruptcy act.

Counsel for the bank relies principally upon Remington on Bankruptcy, citing, among others, Section 2263, which counsel quotes as follows:

"Thus, liens for individual debts on the individual property of a partner are not voidable as preferences, nor nullified as legal liens by the bankruptcy of the partnership."

But the quotation is from the 1908 edition, and no authority is cited which sustains it, whereas in the 1915 edition the author adds to the foregoing, the following:

"However, by Section 5 of the act not only is the partnership trustee the trustee also for the individual estate, even where there is no individual adjudication, yet Section 5 in Clause g provides that the assets are to be so marshalled as to prevent preferences, and to secure the equitable distribution of the property of the several estates, from which it might be implied that the individual estates of the non-bankrupt partners would be treated in this respect as if there had been an individual bankruptcy along with the partnership adjudication;" citing Francis vs. McNeal, supra.

And Section 2268 of the old edition of Remington, also quoted by counsel for the bank, has been changed to read as follows:

[fol. 57] "Nor, in general, are transfers by individual partners of individual assets voidable as preferences in partnership bankruptcies (unless the individual be also bankrupt, or perhaps, though not adjudicated bankrupt, he be insolvent and his estate be in process of administration in the firm bankruptcy by virtue of Section 5)."

And the case of Lehigh Lumber Company, 101 Fed. 216, cited by Remington and also relied on by counsel, I do not think sustains the proposition for which it is cited. In that case a former firm creditor had surrendered a firm note and taken instead a note of an individual member. The transaction was reviewed by the court and held to be such as to constitute the creditor a bona fide creditor of the individual partner, and it was accordingly held that the judgment obtained on the note against the individual partner did not operate to the prejudice of the partnership creditors. But the court was careful to add:

"Whether the judgment is valid as against her individual creditors is a question not before us, and not decided, but it is clear that the rights of the creditors of the firm are not affected by its entry."

Thus the court expressly states it does not decide the question now before us.

The claim of the Liberty National Bank, therefore, is disallowed as a secured claim, but may be allowed as an unsecured claim against all three estates, and it may be so ordered.

Abram P. Staples, Special Referee.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA

[Title omitted]

ORDER OF REFEREE OF DECEMBER 9, 1921

[fol. 58] BEFORE A. P. STAPLES, SPECIAL REFEREE IN BANKRUPTCY, AT ROANOKE, VIRGINIA, IN SAID DISTRICT, ON THE 9TH DAY OF DECEMBER, 1921

Order

This day came the Trustee in Bankruptcy, James A. Bear, by his attorney, and the Liberty National Bank of Roanoke, Virginia, a corporation, by its Attorney, and these causes coming on to be heard upon the two proofs of debt filed by the Liberty National Bank on the 31st day of May, 1921, asserting a debt of $5,566.00 as secured by the lien of a judgment recovered on the 30th day of July, 1920, in the Clerk's Office of the Corporation Court for the City of Roanoke, Virginia, (an abstract of which said judgment was filed with the proof of claim), the claimant alleging that said judgment constitutes a lien upon certain real estate, of the individual Bankrupts, W. L. Becker, Sr., and W. L. Becker, Jr., situated in Roanoke City, Virginia and upon the exceptions and objections to said proof of debt filed by the Attorney for the Trustee in Bankruptcy together with his grounds of objection thereto, filed in writing.

And the referee, upon consideration of the questions thereby presented, being of opinion that the judgment of the claimant, Liberty National Bank, having been recovered within four months of the filing of the petition in Bankruptcy against the partnership of W. L. Becker & Co., and the Roanoke Provision Company, of which partnership the Bankrupts, against whose estate the lien is claimed, viz: W. L. Becker, Sr., and W. L. Becker, Jr., were both members the lien thereof is avoided and annulled, it is ordered that the said claims of the Liberty National Bank be disallowed as secured claims against any of the Bankrupt estates; It is further ordered that said claims of the Liberty National Bank be and are hereby allowed as unsecured claims against the estates of W. L. Becker, Sr., and W. L. Becker, Jr., and the Roanoke Provision Company.

Given under my hand this 9th day of December, 1921.

Abram P. Staples, Special Referee in Bankruptcy.

[fol. 59] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA

[Title omitted]

PETITION FOR APPEAL FROM REFEREE ORDER OF DEC. 9, 1921—Filed March 7, 1922, Before Referee

To A. P. Staples, Esq., Special Referee in Bankruptcy:

The Liberty National Bank of Roanoke, Virginia, a corporation, and a creditor of each of the above named bankrupts, conceiving that it is aggrieved by the final order entered on the 9th day of December, 1921, in the above entitled proceedings, denying the priority claimed by petitioner on its judgment against the above named bankrupts in their individual capacity, and denying that said judgment as to each of said bankrupts is a prior lien on the individual assets real and personal of said bankrupts, does hereby petition for an appeal from said order to the United States District Court for the Western District of Virginia, and prays that its appeal may be allowed and a citation granted, directed to James A. Bear, Trustee in Bankruptcy for each of the above named bankrupts in their individual capacity, commanding him to appear before said court, to do and receive what may appertain to justice to be done in the premises, and that a transcript of the record, proceedings and evidence in said proceedings, duly authenticated, may be transmitted to the District Court of the United States for the Western District of Virginia, at Roanoke, Virginia:

Petitioner excepts to so much of said order as refuses to allow the priority claimed for its judgment against the individual assets of the above named bankrupts, and says that said order is erroneous and contrary to law.

Petitioner complains of the foregoing error in said order disallow-[fol. 60] ing the priority claimed for its judgment in its proofs of debt filed separately against each of said bankrupts in his individual capacity, and complains that said order is erroneous and illegal because it denies the priority so claimed for said judgment against the individual assets of each of said bankrupts;

Petitioner says that said order is erroneous, and complaint is made thereof, because of the error in holding that the adjudication of certain partnerships known as the Roanoke Provision Company and W. L. Becker & Company, of which partnerships W. L. Becker, Sr., and W. L. Becker, Jr., were members, on August the 20th, 1920 dissolved the lien created by its judgment recovered against W. L. Becker Sr., and W. L. Becker, Jr., individually for $5,566.00, with interest on $5,150.00 from June the 15th, 1920, $5.00 attorney's fee and five per cent collection fee on $5,150.00. This judgment was recovered in the Corporation Court for the City of Roanoke, Virginia, at the July term, 1920, and docketed on July 31st, 1920, according to the laws of Virginia, in Judgment Lien Docket No. 7 page 161.

The foregoing partnerships were adjudicated bankrupt on August

the 20th 1920, on an involuntary petition, but the individuals, W. L. Becker, Sr., and W. L. Becker, Jr., were not adjudged bankrupts individually until April the 28th 1921, when they filed their voluntary petition. Petitioner says that more than four months having elapsed after the recovery and docketing of its judgment against said bankrupts before they were adjudged bankrupts individually that said judgment had become final at the time they were so adjudged individually, and that said judgment was and is valid and subsisting lien and a prior lien on the real and personal assets owned individually by said bankrupts, and that said judgment was not dissolved by said adjudication of said partnerships on August the 20th, 1920, or by the subsequent adjudication of the individuals on April the 28th, 1921;

Petitioner says that said order is erroneous. It is based on the theory that because the bankrupt court, when the partnerships were adjudicated, might have taken control of both partnership and individual assets, this would prevent the judgment of petitioner from becoming final.

[fol. 61] Petitioner says that the order is wrong and erroneous both as to the law and the facts in taking such a position. The bankruptcy act makes a partnership a separate entity and allows a partnership to be adjudged a bankrupt, and the adjudication of said partnership on August the 20th, 1920, while it did dissolve petitioner's judgment as to said partnerships, yet, the solemn judgment of a court of record against the individuals could only be dissolved by the subsequent adjudication of such individuals within four months from the rendition of such judgment, and then only under Sec. 67-e of the Bankruptcy Act where "It appears that said lien was obtained and permitted while the defendant was *in*solvent, and that its exist*a*nce and enforcement will work a perference." The judgment of petitioner against the individual assets worked no preference against the partnership creditors, and it was this class of creditors alone that the bankruptcy court was dealing with until the individuals were adjudicated bankrupts on April the 28th, 1921;

The order is erroneous relative to the individual assets having passed under the control of the bankrupt court. While it is true that the individual partners may have filed, in the bankruptcy proceedings against the partnership, a list of their individual assets, yet, the facts are that they did not deliver possession or control of said individual assets to the bankruptcy court, but, upon the contrary, exercised independent ownership and control over said individual assets, and without the consent of the bankruptcy court, and without attempting to obtain the consent of the bankruptcy court, said individual bankrupts actually mortgaged their real estate, held individually, to secure a large sum of money which was offered as a composition to their partnership creditors, along with their individual creditors, when the bankrupts knew that it would take more than all of their individual assets to pay their individual creditors;

Petitioner says that each of the bankrupts owned and resided in valuable residences, and also owned a one-fourth undivided interest each in lots in the City of Roanoke, Virginia, and that said bankrupts

remained in entire control of all of said houses and interest in houses and lots, until May the 16th, 1921, and possibly later; when [fol. 62] a trustee in bankruptcy was appointed for them individually;

Petitioner says that said bankrupts paid no rent for the residences which they owned individually and occupied with their families uninterruptedly for a year during the time of the partnership bankrupt proceedings, until some time in Aug., 1921.

Wherefore, your petitioner prays that an appeal may be allowed in the above entitled cause and that the record and proceedings therein, with all things concerning the same, may be sent to the Judge of the District Court for the Western District of Virginia, and that the errors complained of in said order of the Special Referee may be reviewed, and if error be found corrected according to the laws and customs of the United States.

The Liberty National Bank, By L. R. Tucker, Cashier.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA

[Title omitted]

PETITION FOR REVIEW OF REFEREE ORDER OF DEC. 9, 1921—Filed Before Referee on March 7, 1922

To A. P. Staples, Esq., Special Referee in Bankruptcy:

Your petitioner, The Liberty National Bank of Roanoke, Virginia, respectfully shows:

That your petitioner is a creditor of W. L. Becker, Sr., and W. L. Becker, Jr., the above named bankrupts, in their individual capacity, and that its claim has been allowed herein as a general creditor but the priority set up has been denied;

That on the 9th of December, 1921, an order, a copy of which [fol. 63] is hereto annexed was made and entered herein;

That such an order was, and is erroneous, in that it decides that "The claim of The Liberty National Bank * * * is disallowed as a secured claim, but may be allowed as an unsecured claims."

Petitioner assigns as error in said order the refusal by the referee to allow the priority claimed for its debt, which priority it was entitled to hold and maintain and which it asserted in its proof of debt, which is shown by the following facts:

At the July term, 1920, of the Corporation Court of the City of Roanoke, petitioner recovered judgment against W. L. Becker, Sr., and W. L. Becker, Jr., individually, they being sued individually, process being served on them individually, and the court order giving judgment against them individually, as well as against them trading as The Roanoke Provision Company;

This judgment was for $5,566.00, with interest on $5,150.00 from June the 15th, 1920, $5.00 attorney's fee and five per cent collection fee on $5,150.00;

The order refuses the priority claimed by petitioner on its judgment against the individuals and the individual property, because, on August the 20th, 1920, W. L. Becker, Sr., and W. L. Becker, Jr., as partners were adjudged bankrupts on an involuntary petition, but petitioner says that W. L. Becker, Sr., and W. L. Becker, Jr., were not adjudged bankrupts individually at the time the partnership was adjudged, and says that W. L. Becker, Sr., and W. L. Becker, Jr., were not adjudged bankrupts individually until April the 28th, 1921, when they filed their voluntary petition in bankruptcy;

Petitioner's judgment having been docketed in the Clerk's Office of the City of Roanoke according to the laws of Virginia on July the 31st, 1920, in Judgment Lien Docket No. 7, page 161, became a lien on all the real estate owned by said bankrupts individually, and more than four months having elapsed from the docketing of said judgment before said individuals were adjudged bankrupts individually, said judgment became and was final, and a legal and binding lien upon the real estate of the individuals held in their individual [fol. 64] capacity and was unaffected by the bankruptcy proceedings of the partnership, because the individuals were not adjudged bankrupt at the time the partnership was adjudged on an involuntary petition and said lien of said judgment was unaffected by the adjudication of the individuals to be bankrupts because more than four months had elapsed since said judgment was recovered and docketed.

Petitioner says that the entire individual assets will not be sufficient to pay the individual creditors and that there will be no surplus from the individual assets to be distributed among the partnership creditors;

Petitioner says that each of the bankrupts owned and resided in valuable residences, and also owned a one-fourth undivided interest each in lots in the City of Roanoke, Virginia, and that said bankrupts remained in entire control of all of said houses and interest in houses and lots until May the 16th, 1921, and possible later, when a trustee in bankruptcy was appointed for them individually.

Petitioner says that said bankrupts paid no rent for the residences which they owned individually and occupied with their families uninterruptedly during all the time of the partnership bankrupt proceedings and until some time in May, 1921, and possible later, when the trustee of their individual estates assumed nominal supervision over said real estate holdings.

Petitioner says that while the individual partners may have filed in the bankruptcy proceedings a list of their individual assets, real and personal, they did not deliver possession or control of said individual assets to the bankrupt court, but, upon the contrary, exercised independent ownership and control over said individual assets and without the consent of the bankruptcy court, or even without asking the consent of the bankruptcy court, actually mortgaged their real estate, held individually, to secure a large sum of money to offer

as a composition to their partnership creditors along with their individual creditors, when the bankrupts knew that it would take more than all of their individual assets to pay their individual creditors;

Petitioner says that it excepts to the order because it refuses to allow [fol. 65] petitioner the priority claimed for its judgment against the individual property of the individual bankrupts and complains that in this respect said order is erroneous and illegal.

Wherefore, your petitioner, feeling aggrieved because of so much of said order as denies priority to its judgment, prays that the same may be reviewed as provided in the bankruptcy law of 1898, and General Order XXVII.

Dated January 31, 1922.

Liberty National Bank of Roanoke, Va. L. R. Tucker, Cashier. Jas. D. Johnston, p. d.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA

[Title omitted]

ASSIGNMENT OF ERRORS BEFORE A. P. STAPLES, SPECIAL REFEREE

Now comes The Liberty National Bank of Roanoke, Virginia, a corporation, a creditor of each of the foregoing bankrupts in his individual capacity, and files the following assignment of errors:

(1) That the Special Referee erred in finding that the judgment of The Liberty National Bank was not a prior lien on the real and personal assets of each of said bankrupts owned and held by them in their individual capacity;

(2) That Special Referee erred in finding that the judgment recovered by the Liberty National Bank of Roanoke, Virginia, a corpo- [fol. 66] ration, against W. L. Becker, Sr., and W. L. Becker, Jr., individually was dissolved by the adjudication of the partnership on August the 20th, 1920, when the individuals were not adjudicated to be bankrupts in their individual capacity until April the 28th, 1921, when said judgment was more than four *four* months old.

(3) That said Special Referee erred in finding that the judgment recovered by said bank against said bankrupts individually was a preference;

(4) That said Special Referee erred in holding that said judgment was dissolved against the bankrupts individually and in refusing to allow the priority claimed for said judgment against the individual assets.

The Liberty National Bank of Roanoke, Va., By Jas. D. Johnston, Atty.

Opinion of District Court of May 23, 1922

In re Roanoke Provision Co., alias W. L. Becker & Co., Bankrupt; In re W. L. Becker, Sr., Bankrupt; In re W. L. Becker, Jr., Bankrupt

Opinion

(1) Sec. 61c reads in part:

"A lien * * * obtained in * * * any proceeding at law * * * which was begun against a person within four months before the filing of a petition in bankruptcy (by or) against such person shall be dissolved by the adjudication of such person to be a bankrupt, if," etc.

Sec. 67f reads in part:

"That all * * * liens * * * obtained by legal proceedings [fol. 67] against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt. * * *"

The order of adjudication of Aug. 20th, 1920, declares the partnership to be a bankrupt and distinctly fails to declare the individuals composing the partnership to be bankrupts. It reads so far as is material as follows:

In the District Court of the United States for the Western District of Virginia

In Bankruptcy

In the Matter of W. L. Becker & Company, Trading Also as Roanoke Provision Co., a Partnership Composed of W. L. Becker and W. L. Becker, Jr., Alleged Bankrupt.

At Roanoke in said District, on the 20th day of August, A. D. 1920, before the Honorable Henry C. McDowell, Judge of said Court in Bankruptcy, the petition of Runkle Co., Inc., et al., that W. L. Becker & Company, trading also as Roanoke Provision Co. be adjudged a bankrupt, within the true intent and meaning of the Acts of Congress relating to Bankruptcy, having been heard and duly considered, the said W. L. Becker & Company, trading also as Roanoke Provision Co., a partnership composed of W. L. Becker *nad* W. L. Becker, Jr., is hereby declared and adjudged bankrupt accordingly.

"And, Whereas, the said W. L. Becker & Company, trading also as Roanoke Provision Co., of Roanoke, in the County of Roanoke and District aforesaid, on the 20 day of August, A. D. 1920, was duly adjudged a bankrupt upon a petition filed in this Court against

it on the 6 day of August, A. D. 1920, according to the provisions of the Acts of Congress relating to Bankruptcy, etc."

The wording of the order of adjudication was not an inadvertence, but was the result of the construction I have put on the Bankrupt Act since my first connection with it. The refusal to adjudge the [fol. 68] individuals composing the firm to be bankrupts was, if erroneous, an error which had to be appealed from within ten days from August 20th, 1920. (Section 25 B. A.) As no appeal was taken within the time allowed by law, neither this court nor any other court can now correct the supposed error. The result is that the individuals composing the partnership have, in the partnership proceeding, never been adjudicated bankrupts. Both the filing of a petition within four months and an adjudication thereon are necessary to nullify a lien of judgment. I read the petition which was filed on August 6, 1920, as praying only for an adjudication of the firm. But even if the petition be read as against both the firm and the persons *coming* it, still it was not and never can be, followed by an adjudication against the individuals composing the firm. Hence the case is not within either sub-section C or sub-section F of Section 67, unless it be proper to say that an adjudication that a firm is a bankrupt is ipso facto an adjudication that each member of the firm is also a bankrupt. But there is no good reason supporting such contention and a very strong reason against it. It is everywhere admitted that the Bankrupt Act recognizes that a partnership is a legal entity, distinct from the individuals composing it. To say that an express adjudication of the firm only is an adjudication of the individuals composing it is to utterly refuse to recognize the entity doctrine. It is to say in effect that the firm and the persons composing it are identical and indistinguishable.

It only remains to be said that a party who seeks an advantage from a final and unappealable decree of court must rely on such decree as it is written or not rely on it at all. And a fortiori one not a party who relies on a decree of court must take it as he finds it, because he has never had any standing to complain of it.

(2) If the order of adjudication in the firm case was correctly drafted, it is too obvious to need argument that the bank's lien on the individual estates of the members of the firm has not been nullified. Both a petition against and an adjudication of the individuals composing the firm are necessary to the nullification of the judg- [fol. 69] ment. And here, whatever may be thought of the petition, it is certain that the order of adjudication does not declare the individuals to be bankrupt.

It seems to me to indubitably follow that the lien of the judgment of the Liberty Bank on the individual estates of the members of the firm has not been nullified by the order adjudicating the firm a bankrupt, whether it was erroneously or properly worded. I see therefore no occasion for discussing the propriety of the wording of the order; nor for discussing what would have been the result

had the adjudication in the case brought by firm creditors declared both the firm and the partners to be bankrupts. The ruling of the referee must be reversed and the lien of the American Liberty Bank upheld.

Henry C. McDowell, District Judge. May 23, 1922.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, AT ROANOKE, ON MAY 23RD, 1922

In Bankruptcy

In re W. L. BECKER & Co., Alias Roanoke Provision Co., Bankrupt; In re W. L. Becker, Sr., Bankrupt; In re W. L. Becker, Jr., Bankrupt.

ORDER OF DISTRICT COURT OF MAY 23, 1922

Upon consideration of the petition of Liberty National Bank for a review of the order of the special referee of December 9th, 1921, it is, for reasons set out in an opinion this day filed, ordered that the said order be and it is hereby reversed, and this cause remanded for such further proceedings in consonance with the above mentioned opinion as may be necessary or proper.

The deputy clerk of this court at Roanoke will forthwith certify a copy hereof to Abram P. Staples, Esq., special referee.

[fol. 70] IN THE DISTRICT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA, AT ROANOKE

[Title omitted]

PETITION FOR APPEAL AND ASSIGNMENT OF ERRORS—Filed May 31, 1922

Now, on this 31st day of May, 1922, comes James A. Bear, Trustee in Bankruptcy of the Estates of W. L. Becker, Sr., and W. L. Becker, Jr., partners trading as W. L. Becker & Company and the Roanoke Provision Company, and of the individual estates of W. L. Becker, Sr., and W. L. Becker, Jr., and files the following assignments of error, upon which he will rely in his prosecution upon his appeal in the above entitled cause from the judgment rendered by this Honorable Court on May 23rd, 1922:

First. The District Court of the United States for the Western District of Virginia erred in reversing by its said order the said order of the Referee dated December 9th, 1921, adjudging and decreeing that the lien of the judgment of the Liberty National

Bank was invalid as a secured or priority claim on the funds in the hands of your petitioner, but adjudging and decreeing that said claim should be allowed as an unsecured claim against the estates of W. L. Becker, Sr., and W. L. Becker, Jr., and the Roanoke Provision Company, which said order of said Referee sustained the objection of your petitioner as to the allowance of said claim as a secured or priority claim. The said District Court by reversing the said order of the Referee and upholding the alleged lien of the [fol. 71] Liberty National Bank was erroneous, in that on August 20th, 1920, the firms of W. L. Becker & Company and the Roanoke Provision Company, composed of W. L. Becker, Sr., and W. L. Becker, Jr., were adjudged bankrupts and by virtue of the filing of said petition and said adjudication, and further proceedings had in said matter before the Bankruptcy Court and the Referees thereof, and especially the filing by the said W. L. Becker, Sr., and W. L. Becker, Jr., of lists of their assets and liabilities in compliance with an order of the Referee, all of the property of W. L. Becker, Sr., and W. L. Becker, Jr., then became and was as of the date of the filing of the petition in bankruptcy of Runkle & Company, to-wit, August 6th, 1920, within and under the jurisdiction of the United States District Court for the Western District of Virginia, and became and was subject to administration in accordance with the Acts of Congress relating to bankruptcy, under and by virtue of which Acts no liens could be acquired and perfected on said individual properties, or the proceeds of sale thereof, which would be entitled to priority, or which could be proven as secured claims.

Second. The District Court of the United States for the Western District of Virginia erred in reversing the said order of the Referee dated December 9th, 1921, and thereby upholding the alleged lien of the Liberty National Bank for the reason that by virtue of the appointment and qualification of your petitioner as Trustee of both partnership and individual estates, title to all of the property of both partnership and individual estates thereby became and was vested in your petitioner as Trustee, whose title thereto relating back to the date of the filing of said petition of Runkle & Company, to-wit, on August 6th, 1920, and no liens could be acquired or perfected thereon which would disturb or render inoperative the provisions of the Act of Congress relating to Bankruptcy and the administration of estates in bankruptcy. The effect of the said order of said District Court is to allow a lien to be perfected on the property of the bankrupts after said property became subject to the jurisdiction of the bankruptcy court.

Third. The District Court of the United States for the Western [fol. 72] District of Virginia erred in reversing the said order of the Referee dated December 9th, 1921, and thereby upholding as a lien the alleged judgment of the Liberty National Bank of Roanoke, Virginia, for the reason that said judgment had not been recovered four (4) months prior to the filing of the petition of Runkle & Company, to-wit, August 6th, 1920, and four (4) months prior to the said order of Referee R. Q. Mosby, entered August 23rd, 1920, and

that said judgment only became four months old prior to the filing of the individual voluntary petitions of W. L. Becker, Sr., and W. L. Becker, Jr., to-wit, April 27th, 1921, because litigation was pending in said District Court over the offer of composition filed in the cause, and that appellee bank is now attempting to take advantage of time consumed with litigation pending over said offer of composition.

Fourth. The United States District Court for the Western District of Virginia erred in reversing the said order of the Referee dated December 9th, 1921, and upholding the alleged lien of the Liberty National Bank of Roanoke Virginia, in that the proof taken in this proceeding shows that the debt evidenced by the judgment claimed to be entitled to priority against the individual estates of W. L. Becker, Sr., and W. L. Becker, Jr., was in truth and in fact a partnership debt and all the proceeds of the note on which the judgment was obtained were in fact used for partnership purposes, and not for the purposes of the individuals.

Wherefore, the undersigned, Trustee as aforesaid, avers that this is an appeal from a judgment allowing a claim of over $500.00, and is hence cognizable by the United States Circuit Court of Appeals for the Fourth Circuit, and he therefore prays for an appeal to the United States Circuit Court of Appeals, Fourth Circuit.

James A. Bear, Trustee in Bankruptcy as Aforesaid. Jas. A. Bear, Hall, Wingfield & Apperson, Attorneys.

Received May 31, 1922.

(Signed) Henry C. McDowell, District Judge.

[fols. 73 & 74] IN UNITED STATES DISTRICT COURT

MEMORANDUM REQUIRED BY RULE 14, SECTION 7, OF THE RULES OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

I, L. T. Hyatt, Clerk of the United States District Court for the Western District of Virginia, at Roanoke, Virginia, certify as follows:

That petition for appeal was filed May 31, 1922.

That order allowing appeal is dated June 1, 1922.

That no appeal bond was required.

That citation is dated June 1, 1922, and that service thereof was accepted on June 2, 1922.

That the original papers mentioned in this memorandum have been sent to the clerk of the United States Circuit Court of Appeals, at Richmond, Virginia.

Given under my hand this 8th day of June, 1922.

L. T. Hyatt, Clerk, By Frank J. Hall, Deputy.

In United States District Court

Clerk's Certificate

United States of America,
Western District of Virginia, To wit:

I, L. T. Hyatt, Clerk of the United States District Court for the Western District of Virginia, at Roanoke, Virginia, certify that the foregoing is a true transcript of the record and proceedings of the District Court of the United States for the Western District of Virginia made up in accordance with the stipulation of counsel as to the documents to be included in the transcript filed in said cause on June 7, 1922.

In testimony whereof, I hereunto set my hand and affix the seal of the said court this 8th day of June, 1922.
L. T. Hyatt, Clerk, By Frank J. Hall, Deputy. (Seal.)

[fol. 75] Proceedings in the United States Circuit Court of Appeals for the Fourth Circuit

No. 2016

[Title omitted]

Appeal from the District Court of the United States for the Western District of Virginia, at Roanoke

June 9, 1922, transcript of record is filed and the cause docketed.
Same day, original petition for appeal, order allowing appeal, and citation are certified up under Sec. 7 of Rule 14.
Same day, appearance of Harvey B. Apperson is entered for the appellant.

[fol. 76] Motion of Appellee to Dismiss Appeal—Filed June 10, 1922

Now comes The Liberty National Bank of Roanoke, Virginia, a corporation, the Respondent in the above entitled matter, and moves the Court to dismiss the Petition for an Appeal.

(1) Because no one of the errors complained of in said petition constitutes any ground for an appeal from the decision of the District Court of the United States for the Western District of Virginia.

(2) Because there is no error in the opinion of said District Court and no error in the order based on said opinion.

(3) Because Petitioner bases all his objections on the theory that the District Court of the United States for the Western District of Virginia, erred in not holding that the bankruptcy of the partner-

ship dissolved the judgment recovered against the individual partners in their individual capacity. Respondent denies that the bankruptcy of the partnership, which is a separate entity, dissolved its judgment against the individuals, and says that its judgment against the individuals was more than four months old when said individuals were adjudged bankrupts.

(4) Because no proper or legal proceedings have been taken or had to avoid or discharge the lien of Respondent's judgment against said W. L. Becker, Sr., and W. L. Becker, Jr., individually. The objections filed by Petitioner against the allowance of Respondent's judgment as a secured debt do not allege that either W. L. Becker, Sr., or W. L. Becker, Jr., was insolvent at the time said judgment was recovered.

The Petition for an Appeal nowhere alleged that either W. L. Becker, Sr., or W. L. Becker, Jr., was insolvent at the time said judgment was recovered.

Nowhere in the proceedings is it alleged that W. L. Becker, Sr., [fol. 77] and W. L. Becker, Jr., were insolvent at the time said judgment was recovered.

Respondent says that it is absolutely essential that Petitioner allege and prove by satisfactory evidence that W. L. Becker, Sr., and W. L. Becker, Jr., were insolvent at the time the lien of Respondent's judgement attached. Respondent says that Petitioner has neither alleged nor proven insolvency.

(5) Because "the order of adjudication of August 20th, 1920, declares the partnership to be a bankrupt, and distinctly failed to declare the individuals composing the partnerships to be bankrupts," was not appealed from. "The refusal to adjudge the individuals composing the firm to be bankrupts was, if erroneous, an error which had to be appealed from within ten days from August the 20th, 1920," and no appeal was taken.

Liberty National Bank of Roanoke, Virginia, By Jas. D. Johnston, Attorney.

STATE OF VIRGINIA,
City of Roanoke, To wit:

I, M. N. Ronald, a Notary Public in and for the City and State aforesaid, do hereby certify that L. R. Tucker has this day personally appeared before me in my City and State aforesaid, and made oath that he is cashier of the Liberty National Bank of Roanoke, Virginia, and the matters and things set forth in the foregoing motion to dismiss are true to the best of his knowledge and belief.

My commission expires on the 10th day of March, 1925.
Given under my hand this the 9th day of June, 1922.

W. M. Ronald, Notary Public.

June 14, 1922, appearance of Jas. D. Johnston is entered for the appellee.

[fol. 78] IN U. S. CIRCUIT COURT OF APPEALS

DEMURRER OF APPELLEE TO PETITION FOR APPEAL—Filed June 14, 1922

The said Respondent says that the Petition for an Appeal is not sufficient in law, and for all that is stated in said Petition, the order of the District Court is clearly right. The grounds of demurrer relied on are as follows:

(1) Petitioner assigns as the first error that the District Court of the United States for the Western District of Virginia erred in not holding that the bankruptcy of the partnership ipso facto rendered null and void Respondent's judgment against W. L. Becker, Sr., and W. L. Becker, Jr., individually.

Respondent says that the partnership of W. L. Becker & Co., and the Roanoke Provision Co., were separate entities, and that said partnerships were so adjudged to be bankrupt as separate entities, and that the adjudication of these partnerships did not dissolve, nor render null and void Respondent's judgment against the individuals. Nor did the filing of the schedules of the individual assets affect Respondent's judgment.

Respondent sayd that its judgment against W. L. Becker, Sr., and W. L. Becker, Jr., individually was more than four months old when said parties were individually adjudged to be bankrupt.

(2) Respondent says that the Petitioner has neither averred nor proven that W. L. Becker, Sr., and W. L. Becker, Jr., individually, was insolvent at the time the lien of its judgment attached, and that it is essential that Petitioned both allege and prove the insolvency of these parties individually, at the time the judgment attached.

(3) Respondent says that its judgment being against W. L. Becker, Sr., and W. L. Becker, Jr., individually could only be dissolved, or rendered null and void, by these parties being adjudged bankrupts individually within four months from the time the lien of said [fol. 79] judgment attached against them individually, and, then, only where it was alleged and proven that they were insolvent individually. Not all judgments recovered within even four months are dissolved or rendered null and void by bankruptcy, but only such as are alleged and proven to have been recovered when the party was either insolvent, or the party or parties to be benefited thereby had reasonable cause to believe the defendant was insolvent and in contemplation of bankruptcy.

None of the essentials for the disolution of Respondent's judgment exist here.

(4) Respondent says that the petition to have the partnerships of W. L. Becker & Co., and the Roanoke Provision Co., adjudged bankrupts contained a prayer that both the partnerships and the individuals be adjudged bankrupts, but the order entered on said

petition by the Judge of the District, distinctly failed and refused to adjudicate the individuals to be bankrupts.

Petitioner having failed to appeal from such order within ten days cannot now be heard to complain. If Petitioner invokes the aid of said order for his purposes he will not be allowed to extend its operation beyond the limitations fixed thereon by the Judge of the District Court.

Wherefore this Respondent submits that its demurrer should be sustained and that the order of the District Court complained of in the Petition herein should be affirmed.

The Liberty National Bank of Roanoke, Va., By Jas. D. Johnston, Attorney.

STATE OF VIRGINIA,
City of Roanoke, To wit:

[fol. 80] I, M. N. Ronald, a Notary Public in and for the City and State aforesaid, do hereby certify that Jas. D. Johnston, counsel for the Liberty National Bank of Roanoke, Va., has this day personally appeared before me in my city aforesaid and made oath that the foregoing demurrer is well founded in point of law; and I do hereby certify that L. R. Tucker, cashier of said bank, has appeared before me in my city aforesaid and made oath that said demurrer is not interposed for delay.

My commission expires on the 10th day of March, 1925.

Given under my hand this the 13th day of June, 1922.

M. N. Ronald, Notary Public.

June 22, 1922, twenty-five copies of the printed record are filed.

IN U. S. CIRCUIT COURT OF APPEALS

STIPULATION AS TO ADDENDUM TO RECORD—Filed July 10, 1922.

(Memo: This Stipulation is printed on page 16a.)

October 26, 1922, apearance of Jas. A. Bear is entered for the appellant.

IN U. S. CIRCUIT COURT OF APPEALS

ARGUMENT OF CAUSE

November 17, 1922, (November Term, 1922), cause came on to be heard, together with No. 2011, before Woods and Waddill, Circuit Judges, and Rose, District Judge, and is argued by counsel and submitted.

[fol. 81] UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 2016

[Title omitted]

Appeal from the District Court of the United States for the Western District of Virginia, at Roanoke

In Bankruptcy

(Argued December 17, 1922; Decided December 21, 1922)

Before Woods and Waddill, Circuit Judges, and Rose, District Judge

James A. Bear and Harvey B. Apperson (Hall, Wingfield & Apperson on brief) for Appellant, and James D. Johnston for Appellee.

OPINION—Filed December 21, 1922

[fol. 82] WOODS, Circuit Judge:

The vital question to be decided is whether the adjudication in bankruptcy of an insolvent partnership carries into bankruptcy the members of the partnership as individuals.

On August 6, 1920, an involuntary petition in bankruptcy was filed against W. L. Becker and W. L. Becker, Jr., partners trading as W. L. Becker & Company and also as the Roanoke Provision Company, alleging that the partnership was insolvent and that it had executed, on August 4, 1920, a general deed of assignment to a trustee for the benefit of creditors. On August 7 the members of the partnership filed their answer, admitting the allegations of the petition and waiving process. On August 20, 1920, the partnership was adjudged bankrupt. On August 30, 1920, in pursuance of an order of the referee, the partnership filed schedules of its assets and liabilities, and W. L. Becker and W. L. Becker, Jr., filed schedules of their individual assets and liabilities. Two offers of composition were made but the objections thereto were sustained by the District Court.

On April 27, 1921, W. L. Becker and W. L. Becker, Jr., filed their voluntary petitions in bankruptcy as individuals, and on April 28, 1921, were adjudged bankrupts. On May 16, 1921, James A. Bear was elected trustee for the partnership and both individuals.

The Liberty National Bank of Roanoke, in a formal proof of debt in the bankruptcy proceedings of the individuals, claimed a lien on the real estate of the individual partners by virtue of a judgment for $5,666.05 and interest and costs, recovered July 31, 1920, against the partnership, Roanoke Provision Company, and W. L. Becker and W. L. Becker, Jr., as individuals. This judgment was based on a note made by W. L. Becker and the Roanoke Provision Company,

endorsed by W. L. Becker and W. L. Becker, Jr. Partnership assets will not be sufficient to pay partnership debts, and individual assets will not be sufficient to pay individual debts including endorsements of the individuals on partnership notes.

It will be observed that the judgment was recovered less than four months before the petition upon which the adjudication of the firm as a bankrupt was made, but more than four months before the petition upon which the individuals were formally adjudicated. It is [fol. 83] on this ground alone that the Liberty National Bank asserts the validity of the lien of the judgment. The concrete question then is whether the lien of the judgment on individual real estate was displaced by the bankruptcy of the partnership, which occurred less than four months after the date of the lien. And that depends on whether the adjudication of the bankruptcy of the partnership was necessarily an adjudication of the several individuals composing it.

A judgment against the partnership binds its members as individuals and is a lien on the real estate of the individuals composing it. Before the bankruptcy statute, a proceeding instituted in the court of equity to marshal the assets of a partnership on the ground of insolvency required the marshalling of the individual assets and proof of all claims, both partnership and individual. It is impossible for a partnership to be insolvent when the partners individually or any one of them is solvent, because every partner is individually liable for all the debts of a partnership. A proceeding in equity to marshal assets of a partnership would necessarily be dismissed upon a showing that the complaining creditor could collect his debt in an action at law from one of the partners. Under a creditor's bill in a court of equity against a partnership, every creditor of the partnership has the right to prove his claim against the individual members of the firm and have it paid from the individual assets if there be a sufficient surplus over the individual liabilities. Pomeroy Eq. Juris. (4th ed.) Secs. 2371, 2372.

In Francis v. McNeal, 228 U. S. 695, while recognizing the separate entity of the partnership for some purposes, principally for the application of partnership assets to partnership debts, the court held the individual affairs of a partner who had not as an individual been adjudged bankrupt should be administered in the bankruptcy proceedings of the partnership. The court said subsections c, d, e, f and g of section 5 contemplated administration of both partnership and individual estates, except, as provided in subsection h, "in the event of one or more but not all of the members of a partnership being adjudged bankrupt."

Recognizing that insolvency of the partnership connotes insolvency of every member of it, in section 5 from c to g the statute provides, [fol. 84] in case of partnership bankruptcy, for administration of the individual property of the partners as well as the partnership property, and proof and adjustment of individual as well as partnership debts: but since insolvency of the individual partner does not connote insolvency of the partnership, the statute provides that bank-

ruptcy of one or more but not all the partners shall not result in the administration of the partnership affairs in the bankruptcy court.

In discussing 5h in connection with the other clauses of the section, the court in the case cited uses this pregnant language: "But we do not perceive that the clause imports that the partnership could be in bankruptcy, and the partners not." Enforcing this construction the court continues: "On the other hand it would be an anomaly to allow proceedings in bankruptcy against joint debtors from some of whom, at any time before, pending, or after the proceeding, the debt could be collected in full. If such proceedings were allowed it would be a further anomaly not to distribute all the partnership assets. Yet the individual estate after paying private debts is part of those assets so far as needed. Section 5f. Finally, it would be a third incongruity to grant a discharge in such a case from the debt considered as joint but to leave the same persons liable for it considered as several."

There are other practical reasons for holding the bankruptcy of the partnership to carry with it the bankruptcy of the individual partners. Since individual debts and individual property as well as partnership debts and partnership property must be brought into the partnership bankruptcy and the equities of the creditors adjusted, there is nothing left for a separate petition and adjudication of the individuals to act upon. It cannot be that the bankruptcy of the partnership carries the partners into the proceeding with their assets and liabilities for the purpose of proving debts, adjusting equities, preventing preferences generally and distributing to creditors the individual as well as partnership assets, and yet does not carry them in for the two other main purposes of the bankruptcy statute, namely, protecting creditors against the preference of liens acquired within four months of bankruptcy, and discharging the debtor from his debts.

On principle and the reasoning and conclusion of the court in [fol. 85] Francis v. McNeal, we see no escape from the holding that the adjudication of the partnership carries with it all the individuals of the partnership. This conclusion is supported also by the reasoning in Voccaro v. Security Bank, 103 Fed. 436 Euclid National Bank v. Union Trust & Deposit Co., 149 Fed. 975; Francis v. McNeal, 186 Fed. 481; Menke v. Sunderman, 186 Fed. 486; Carter v. Whistler, 275 Fed. 743, 746; Abbott v. Anderson, 265 Ill. 285.

We conclude that an adjudication of the partnership was necessarily an adjudication of the bankruptcy of the individuals composing it, and that in the case presented the lien of a judgment obtained within four months of the filing of the petition against the partnership was lost by the adjudication.

The insolvency of the partnership at the date of the judgment seems to have been assumed in the court below. At any rate, no issue of solvency or insolvency at the date of the judgment appears to have been made. We express no opinion as to the existence of such insolvency or its effect.

The issue of the allowance or rejection of a claim of a lien on the bankrupt property is reviewable in this court only by appeal; and

therefore is decided in this proceeding. In the Matter of Loving, 224 U. S. 183; Soder v. Arts, 213 U. S. 223.

Reversed.

UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 2016

[Title omitted]

[fol. 86] Appeal from the District Court of the United States for the Western District of Virginia

DECREE—Filed and Entered December 22, 1922

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Virginia, and was argued by counsel.

On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the decree of the said District Court, in this cause, be, and the same is hereby, reversed with costs; and that this cause be, and the same is hereby, remanded to the District Court of the United States for the Western District of Virginia, at Roanoke, for further proceedings in accordance with the opinion of this Court.

C. A. Woods, U. S. District Judge. December 22, 1922.

IN U. S. CIRCUIT COURT OF APPEALS

PETITION OF APPELLEE FOR STAY OF MANDATE—Filed January 13, 1923

The Appellee, by its counsel, James D. Johnston, Esq., represents unto the Court that it is its intention to apply to the Supreme Court of the United States for a writ of certiorari to this Court in the above entitled cause, and respectfully asks that the issuance of the mandate [fol. 87] of this Court in the above case be stayed pending its application in the Supreme Court for said writ of certiorari.

Jas. D. Johnston, Counsel for Appellee. January 11th, 1923.

UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 2016

[Title omitted]

Appeal from the District Court of the United States for the Western District of Virginia, at Roanoke

ORDER STAYING MANDATE—Filed January 13, 1923

Upon the application of the Appellee, by its counsel, James D. Johnston, Esq., and for good cause shown,

[fol. 88] It is ordered that the issuance of the mandate of this Court in the above entitled cause be, and the same is hereby, stayed pending the Appellee's application in the Supreme Court of the United States for a writ of certiorari to this Court, provided said application is presented in the said Supreme Court within 30 days from January 22, 1923.

C. A. Woods, U. S. District Judge. January 13, 1923.

UNITED STATES OF AMERICA,
Fourth Circuit, ss:

IN U. S. CIRCUIT COURT OF APPEALS

CLERK'S CERTIFICATE

I, Claude M. Dean, clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the foregoing is a true copy of the entire record and proceedings in the therein entitled causes as the same remain upon the records and files of the said Circuit Court of Appeals.

In testimony whereof, I hereto set my hand and affix the seal of the said United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, this 24th day of January, A. D. 1923.

Claude M. Dean, Clerk U. S. Circuit Court of Appeals, Fourth Circuit. (Seal of United States Circuit Court of Appeals, Fourth Circuit.)

UNITED STATES OF AMERICA,
Fourth Circuit, ss:

[fol. 89] UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

WRIT OF CERTIORARI AND RETURN—Filed June 2, 1923

I, Claude M. Dean, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do make return of the annexed writ of certiorari issued out of the Supreme Court of the United States in the cause therein entitled on the 29th day of March, 1923, by annexing hereto a certified copy of the stipulation of counsel of record, "that the transcript of the record already on file in the Supreme Court of the United States may be taken as the return," the original of which stipulation was filed in my office on this 31st day of May, A. D., 1923.

In testimony whereof, I hereto set my hand and affix the seal of the said Circuit Court of Appeals, at Richmond, Virginia, on this 31st day of May, A. D., 1923.

Claude M. Dean, Clerk U. S. Circuit Court of Appeals, Fourth Circuit. (Seal of United States Circuit Court of Appeals, Fourth Circuit.)

[fol. 90] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1922

No. 889

[Title omitted]

STIPULATION AS TO TRANSCRIPT OF RECORD IN THE SUPREME COURT OF THE UNITED STATES

It is hereby stipulated and agreed between counsel that the transcript of the record already on file in the Supreme Court of the United States may be taken as the return.

Jas. D. Johnston, Attorney for Petitioner; G. A. Winfield, Attorney for Respondent.

UNITED STATES OF AMERICA,
Fourth Circuit, ss:

I, Claude M. Dean, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the foregoing stipulation of Counsel is a true copy of the original filed May 31, 1923, and now remaining among the records and proceedings in the therein entitled cause.

In testimony whereof, I hereto set my hand and affix the seal of the said Circuit Court of Appeals, at Richmond, Virginia, on this 31st day of May, A. D., 1923.

Claude M. Dean, Clerk U. S. Circuit Court of Appeals, Fourth Circuit. (Seal of United States Circuit Court of Appeals, Fourth Circuit.)

[fol. 91] UNITED STATES OF AMERICA, ss:

(Seal of the Supreme Court of the United States.)

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Fourth Circuit, Greeting:

Being informed that there is now pending before you a suit in which James A. Bear, Trustee in Bankruptcy of the Estates of W. L. Becker, Sr., and W. L. Becker, Jr., Partners, Trading as W. L. Becker & Company and as the Roanoke Provision Company, and Trustee in Bankruptcy of the Individual Estates of W. L. Becker, Sr., and W. L. Becker, Jr., Bankrupts, is appellant, and The Liberty National Bank of Roanoke, Virginia, is appellee, No 2016, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the District Court of the United States for the Western District of Virginia, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, Do hereby com-[fol. 92] mand you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the twenty-ninth day of March, in the year of our Lord one thousand nine hundred and twenty-three.

Wm. R. Stansbury, Clerk of the Supreme Court of the United States.

[fol. 93] [File endorsement omitted.]

[fol. 94] [File endorsement omitted.]

In testimony whereof, I hereto set my hand and affix the seal of the said Circuit Court of Appeals, at Richmond, Virginia, on this 31st day of May, A. D., 1923.

Claude M. Dean, Clerk U. S. Circuit Court of Appeals, Fourth Circuit. (Seal of United States Circuit Court of Appeals, Fourth Circuit.)

[fol. 91] UNITED STATES OF AMERICA, ss:

(Seal of the Supreme Court of the United States.)

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Fourth Circuit, Greeting:

Being informed that there is now pending before you a suit in which James A. Bear, Trustee in Bankruptcy of the Estates of W. L. Becker, Sr., and W. L. Becker, Jr., Partners, Trading as W. L. Becker & Company and as the Roanoke Provision Company, and Trustee in Bankruptcy of the Individual Estates of W. L. Becker, Sr., and W. L. Becker, Jr., Bankrupts, is appellant, and The Liberty National Bank of Roanoke, Virginia, is appellee, No 2016, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the District Court of the United States for the Western District of Virginia, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, Do hereby com-[fol. 92] mand you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the twenty-ninth day of March, in the year of our Lord one thousand nine hundred and twenty-three.

Wm. R. Stansbury, Clerk of the Supreme Court of the United States.

[fol. 93] [File endorsement omitted.]

[fol. 94] [File endorsement omitted.]

In testimony whereof, I hereto set my hand and affix the seal of the said Circuit Court of Appeals, at Richmond, Virginia, on this 31st day of May, A. D., 1923.

Claude M. Dean, Clerk U. S. Circuit Court of Appeals, Fourth Circuit. (Seal of United States Circuit Court of Appeals, Fourth Circuit.)

[fol. 91] UNITED STATES OF AMERICA, ss:

(Seal of the Supreme Court of the United States.)

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Fourth Circuit, Greeting:

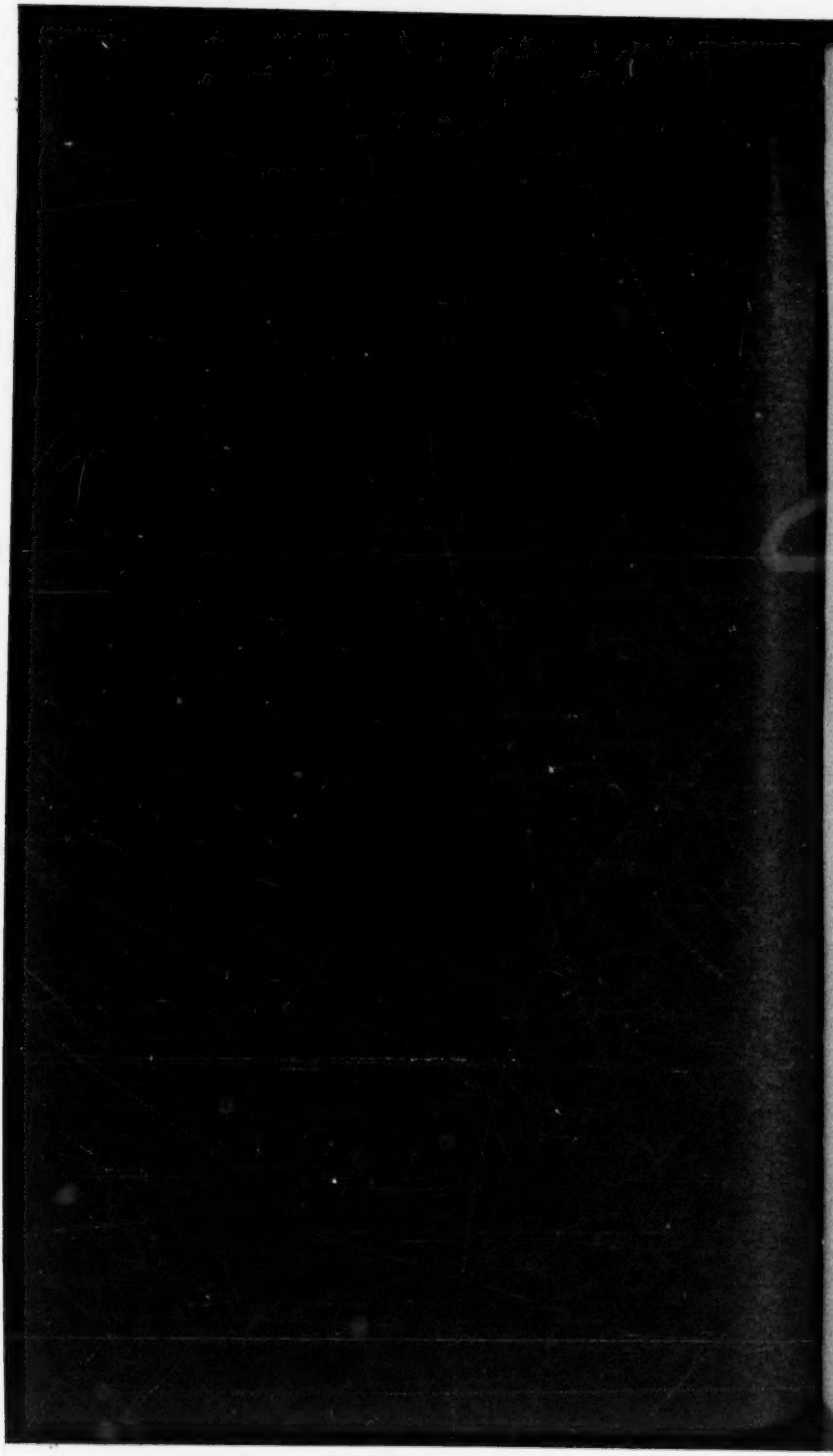
Being informed that there is now pending before you a suit in which James A. Bear, Trustee in Bankruptcy of the Estates of W. L. Becker, Sr., and W. L. Becker, Jr., Partners, Trading as W. L. Becker & Company and as the Roanoke Provision Company, and Trustee in Bankruptcy of the Individual Estates of W. L. Becker, Sr., and W. L. Becker, Jr., Bankrupts, is appellant, and The Liberty National Bank of Roanoke, Virginia, is appellee, No 2016, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the District Court of the United States for the Western District of Virginia, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, Do hereby com-[fol. 92] mand you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the twenty-ninth day of March, in the year of our Lord one thousand nine hundred and twenty-three.

Wm. R. Stansbury, Clerk of the Supreme Court of the United States.

[fol. 93] [File endorsement omitted.]

[fol. 94] [File endorsement omitted.]



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923.

No. .....

THE LIBERTY NATIONAL BANK OF ROANOKE, VIRGINIA, A CORPORATION, PETITIONER

v.

JAMES A. BEAR, TRUSTEE IN BANKRUPTCY of W. L. BECKER & COMPANY and ROANOKE PROVISION COMPANY, and W. L. BECKER, SR., and W. L. BECKER, JR., INDIVIDUALLY, RESPONDENT

PETITION FOR WRIT OF CERTIORARI

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioner, The Liberty National Bank of Roanoke, Virginia, a corporation, respectfully petitions this Court for a writ of certiorari to require that there be certified to this court for review and determination the causes, the records of which remain in the United States Circuit Court of Appeals for the Fourth Circuit, being Numbers 2011 and 2016, the short style of each case being James A. Bear, Trustee for, etc. v. said Bank, wherein said Trustee was Petitioner and Appellant and said Bank was Respond-

ent and Appellee, a final decree having been entered on December 22nd, 1922, dismissing said Trustee's petition to Superintend and Revise, in Matter of Law, but reversing the decision of the District Court on the Petition for Appeal.

This is a Bankruptcy cause where the final decision of the Circuit Court of Appeals, in reversing the District Court, rejects the priority asserted by the Bank on its judgment against the individual estates of W. L. Becker, Sr., and Jr.; where the amount in controversy exceeds the sum of $2,000.00; and where the determination of the questions involved in the rejection of the priority claimed by the Bank on its judgment against the individual estates is essential to a uniform construction of the Bankruptcy Act throughout the United States.

A BRIEF STATEMENT OF THE MATTER INVOLVED

(a) W. L. Becker, Sr., and Jr., were the sole partners in the two partnerships of W. L. Becker & Company and the Roanoke Provision Company, merchandise brokers in the City of Roanoke, Virginia. These two partnerships committed an act of bankruptcy by making a general assignment of their partnership assets for the benefit of their partnership creditors, and Runkle & Company, and two other partnership creditors, filed an involuntary petition in bankruptcy against the two partnerships, **but the partners in their individual capacity were not made parties to said petition.**

(b) The two partnerships were adjudicated bankrupts on August 20th, 1920, the partnerships having answered said petition, waived process and admitted the act of bankruptcy.

The partners were not made parties defendant individually to the petition against the partnerships, **but the petition against the two partnerships prayed that the individual partners in their individual capacity,** might be

adjudicated bankrupts. The individuals had committed no act of bankruptcy; and the Court by its order in adjudicating the partnerships, expressly failed to declare the individuals composing the partnerships to be bankrupts; and this order of the court in so refusing to adjudicate the individuals to be bankrupts was never appealed from.

The record shows that there will be no surplus from the individual assets for partnership creditors, nor vice versa.

A receiver was appointed for the partnerships and directed to take charge of certain of the partnership assets, and the partnerships were directed to appear before the Referee, who entered an order requiring the two partnerships to file a list of partnership creditors and assets, and the partners to file a list of individual creditors and assets.

(c) On July 20th, 1920, said Bank recovered a judgment for $5,566.05, with interest, collection and attorneys fees and costs against said Roanoke Provision Company, a partnership, and also against W. L. Becker, Sr., and W. L. Becker, Jr., individually, on a negotiable note made jointly by W. L. Becker, Sr., and the Roanoke Provision Company and endorsed by W. L. Becker, Sr., and W. L. Becker, Jr., individually. The judgment was duly docketed according to the laws of Virginia, and became a lien on both partnership and individual real estate, and execution was issued and became a lien on partnership assets subject to levy, and on the individual personal property, including homestead, as the note waived the homestead.

(d) The partnerships purported to offer a composition to their partnership creditors, which was rejected by the District Court because the necessary deposit was not made. Among other things this printed offer of composition contained the following:

"No petition for bankruptcy has been filed by or against such individuals and no discharge of such individ-

ual debts so listed as individual debts is sought; aside, therefore, from the fact that this deed of trust securing the advancement of the money offered in this composition to the partnership creditors will be upon the security of the individual real estate assets, the rights of the individual creditors are not herein sought to be, and will not be, affected by this composition if affirmed."

On November 29th, 1920, **more than four months** after the recover of the Bank's judgment, the partnerships made an amended offer of composition, in which they said the money for the composition, offered solely to partnership creditors, was secured by putting a mortgage on the real estate of the individuals. The Bank objected to the composition because individual assets could not be mortgaged to pay partnership creditors. The District Court sustained the objection and refused the composition by its order of April 20th, 1921.

On April 27th, 1921, **more than nine months after the Bank had recovered its judgment against them,** W. L. Becker, Sr., and W. L. Becker, Jr., **as individuals,** filed their voluntary petitions in bankruptcy, with the required schedules, and on April 28th, 1921, they were adjudged to be bankrupts individually. James A. Bear was thereafter elected trustee of the partnerships by partnership creditors, and trustee of the individual estates of W. L. Becker, Sr., and W. L. Becker, Jr., by the individual creditors.

On May 31st, 1921, the Bank filed its two separate proofs of debt against W. L. Becker, Sr., individually, and against W. L. Becker, Jr., individually, having theretofore filed a separate and independent proof of debt in the bankruptcy proceedings of the partnerships, there being a separate petition and adjudication against the partnerships to which the individuals were not parties.

(e) The Bank alleged in its proofs of debt against the individuals, that its judgment having been recovered,

docketed and execution issued, more than four months before the individuals were adjudicated bankrupts, was a valid and subsisting lien on the individual assets of W. L. Becker, Sr., and W. L. Becker, Jr., and should be paid in full, and that the entire individual assets of both W. L. Becker, Sr. and Jr., would be required to pay individual debts, and that there would be no surplus of individual assets to be applied on partnership debts. The Trustee nowhere denies this allegation that there would be no surplus from the individual estates after paying individual debts.

(f) The trustee of the partnerships and the trustee of the separate estates filed before the Referee four objections to the Bank's debt being paid in full out of the individual assets of the individuals, who were not adjudicated bankrupts until more than nine months after the recovery of its judgment.

These four objections were as follows:

First: That the Bank's judgment against the individuals was dissolved and rendered null and void by the bankruptcy of the partnerships, though the individual partners were not parties to said petition against the partnerships.

Second: That by virtue of the qualification of the trustee of the partnerships, he became vested with the title to the individual estates on the date that the partnerships were adjudged bankrupt by relation back to said date.

Third: That the Bank's judgment against the individuals "only became four months old prior to the filing of the voluntary petition of said individuals, because litigation was pending over the offer of composition filed by the partnerships."

Fourth: That the Bank's debt in truth and in fact was a partnership debt.

The Referee sustained the first and second objections.

above, and refused to allow the Bank's judgment as a secured debt against the individual estates.

(g) The District Court, on the Petition of the Bank for an Appeal, and on its Petition for Review, reversed the Referee, and held that the Bank's judgment against the individual estates had not been nullified by the order adjudicating the firm a bankrupt, and that the court's order refusing to adjudicate the individuals along with the two partnerships was final.

(h) The cause was taken to the Circuit Court of Appeals by the Trustee on a Petition to Superintend and Revise, in Matter of Law, and on a Petition for Appeal. The Circuit Court dismissed the Trustee's Petition to Superintend and Revise, but sustained his Petition for Appeal, thus reversing the District Court, and entered a final decree on December 22nd, 1922, refusing to allow the priority claimed by the Bank on its judgment against the individual estates.

GENERAL REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

Your Petitioner is advised that said final decree of the Circuit Court of Appeals, is erroneous and contrary to and in conflict with the Bankruptcy Act, growing out of a misconstruction and misapplication of the decisions of this court.

The reasons relied upon by your Petitioner for the issuance of said writ and for the granting of its petition may be summarized as follows:

(1) The learned Judges of the Circuit Court of Appeals erred in holding that the bankruptcy of the two partnerships carried with it the bankruptcy of the individual partners, when they were not parties to the partnership petition, when the individual partners had committed no act of bankruptcy, and when more than four months after

the adjudication of the partnerships the individuals were adjudicated bankrupts on their voluntary petition.

(2) Said court erred in holding that the bankruptcy of the partnerships, for making a general assignment, ipso facto dissolved the Bank's judgment against the individual estates.

(3) Said court erred in holding that the Bank's judgment against the individuals had been dissolved, when it was more than four months old, at the time said individuals were adjudicated bankrupt.

(4) Said court erred in holding that in the bankruptcy proceedings against the partnerships, it was legal for the Trustee to go against the individual assets of the partners, when all the individual assets were required for individual debts, without any surplus.

(5) Said court erred in assuming that the partnerships were insolvent, when there was no allegation or proof, that the individuals composing the partnerships were insolvent.

(6) Said court erred in not sustaining the Bank's demurrer and motion to dismiss the Trustee's petition.

(7) Said court erred in not sustaining the decision of the learned Judge of the District Court, when he held that his order refusing to adjudicate the individuals bankrupts, along with the partnerships, had to be appealed from within ten days, and "as no appeal was taken within the time allowed by law," neither his court, nor any other court, could now correct the supposed error.

What effect the bankruptcy of a partnership, to which proceedings the individual partners are not parties in their individual capacity, has upon a judgment against the individuals, who, after such judgment is four months old, become bankrupts on their voluntary petition, has never been passed upon, so far as we are advised, by this Honorable Court, and it is in the interest of jurisprudence and

uniformity of construction and application of the Bankruptcy Act, that this question be finally determined by this Court.

Your Petitioner presents, herewith, a certified copy of the entire record in said cause, and respectfully prays that a writ of certiorari be issued to the end that said cause may be reviewed and determined by this Honorable Court as provided for by law, and that the said decision of the United States Circuit Court of Appeals for the Fourth Circuit may be reversed, and that your Petitioner may have such other and further relief in the premises as to this court may seem just and proper.

THE LIBERTY NATIONAL BANK of Roanoke, Virginia, a Corporation.

By Its Counsel:

JAS. D. JOHNSTON.

STATE OF VIRGINIA, }
CITY OF ROANOKE, } To-Wit

Jas. D. Johnston, being duly sworn, deposes and says that he is the counsel for the above named Petitioner, and that the matters in the foregoing petition are true to the best of his knowledge, in formation and belief.

Subscribed and sworn to before me, this the 26th day of February, 1923.

Florence E. Lawson
Notary Public

[SEAL]

I do hereby certify that the foregoing petition is presented in good faith, and not for the purpose of delay, and that in my opinion the case is a proper one for the issuance of the writ of certiorari prayed for.

Jas. D. Johnston

Counsel For The Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923.

No. .....

THE LIBERTY NATIONAL BANK OF ROANOKE, VIRGINIA, A CORPORATION, PETITIONER

v.

JAMES A. BEAR, TRUSTEE IN BANKRUPTCY of the Estates of W. L. BECKER, SR., and W. L. BECKER, JR., Partners Trading as W. L. BECKER & COMPANY, and as THE ROANOKE PROVISION COMPANY, and TRUSTEE IN BANKRUPTCY of the Individual Estates of W. L. BECKER, SR., and W. L. BECKER, JR., RESPONDENT

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

We believe it will be conducive to clearness to refer throughout this brief, to the Petitioner as the Bank, and the Respondent as Trustee.

The petition, to which this brief is attached, contains a short statement of the facts, and by reference thereto it will be seen that the main issue is whether the bankruptcy

of the partnership, ipso facto, dissolved the Bank's judgment against the individual partners, who were not parties to the petition against the partnerships, and were not before the court.

The essential facts to be considered are the following:

1. That the act of bankruptcy was committed solely by the two partnerships; that the partners as individuals had committed no act of bankruptcy; that the act of bankruptcy by the partnerships was making a general assignment.

2. That upon an involuntary petition, alleging the making of a general assignment, the partnerships were adjudged bankrupts; that the individuals composing the partnerships were not parties to the petition against the partnerships, and no process was had on them as individuals, and they were not before the court. (Record page 29).

3. That while the act of bankruptcy was committed solely by the partnerships, and they alone were parties to the petition, in the prayer of this petition it was prayed that the individuals, as well as the partnerships, might be adjudicated bankrupt. The District Court struck out this portion of the prayer, refused to adjudicate the individuals bankrupts and no appeal was ever taken from this ruling. (Record page 67.)

4. That the Bank's judgment against the individuals was more than nine months old when they were adjudged bankrupts individually on their voluntary petition. The Bank's judgment having been recovered July 20, 1920, (pages 28 and 29 of record) and the individuals having been adjudged on April 28th, 1921, (see page 33, under Section 13 of record).

5. That the Trustee for the partnerships was elected solely by partnership creditors, and the Trustee for the individuals was elected solely by the individual creditors, (page 33, Sec. 14 of record).

6. That there was no surplus from the individual assets to be applied to partnership debts nor vice versa, (see record, page 34, Sec. 18).

7. That the sole object in putting the partnerships in bankruptcy was to apply the partnership assets to partnership debts. This is made very plain in the printed composition offered to partnership creditors, where it is stated that the individuals were not in bankruptcy, and that no discharge was sought from individual debts, (record, top of page 31).

8. That the making of the general assignment by the partnership was of itself an act of bankruptcy, and was an act of bankruptcy that did not involve insolvency. That the individual partners not being parties to the petition against the partnerships, there was of course no allegation of their individual insolvency. That the partnerships having made a general assignment, it was not necessary for the court to inquire into the solvency or insolvency of the partnerships, before adjudicating them bankrupts.

When the individuals on their voluntary petitions were adjudged bankrupts, the Bank filed its two separate proofs of debt alleging that its judgment against these parties, being more than four months old, was a secured debt and should be paid in full, and that it was in no way affected by the bankruptcy of the partnership. The two proofs of debt were the same, and, therefore, only one is printed in the record and begins on page 22.

The Trustee filed before the referee four objections to the allowance of the Bank's debt as a secured claim against the individual estates (record, pages 26-7-8).

The Referee refused to allow the Bank's judgment as a secured claim against the individual estates, but allowed it as an unsecured claim against the two individual estates, and also the partnership estate. (Page 58 of record).

The Bank assigned errors in the ruling of the Referee

(pages 65 and 66 of record) and petitioned the District Court for an appeal and for a review. (Record pages 59 to 65).

The learned Judge of the District Court, in an able opinion, reversed the ruling of the Referee and upheld the lien of the Bank against the individual estates. (Page 66 of record).

The Trustee assigned as errors in the opinion of the learned District Judge the same objections made before the Referee. (Record pages 70-72). The Trustee filed his petitions to Superintend and Revise, in Matter of Law, the proceedings of the District Court and for an Appeal. (Record pages 1-10 and 70-1-2).

The Bank filed to each of these petitions its motion to dismiss and to each its demurrer. (Record pages 11-15 and 76-80).

The learned Judges of the Circuit Court of Appeals dismissed the Trustee's petition to Superintend and Revise, but reversed the decision of the District Court on the Appeal. (Pages 82-85 of record).

A

ASSIGNMENT OF ERRORS AND ARGUMENT

First: The first error in the decision of the learned Judges of the Circuit Court was in holding that the bankruptcy of the partnerships carried with it the bankruptcy of the individual partners, when the partners as individuals were not parties to the petition or proceedings against the partnerships. This ruling will lead to confusion in the application of the bankruptcy act, and is contrary to the decisions of this court.

The court will bear in mind, that the two partnerships made a general assignment, and upon this ground alone, they were adjudged bankrupts. Now a general assignment does not imply or involve insolvency, as was decided in

Francis v. McNeal, 26 American Bankruptcy Reports, page 560, 186 Fed. 481, where the Circuit Court says:

> "The Burtenshaw case was not founded on insolvency of the partnership, or of its members. The act of bankruptcy there charged was an assignment by the partnership of its assets for the benefit of its creditors—**an act of bankruptcy that does not necessarily involve insolvency.**"

It is very apparent why a general assignment need not involve insolvency. A party might have assets many times his liabilities, and yet, for some good reason, find it necessary to make a general assignment which would be in itself an act of bankruptcy, for which he might be adjudged a bankrupt, though perfectly solvent.

The same court goes on to say on this same page, 560:

> "Whether, where the act of bankruptcy charged against a partnership is one that does not involve insolvency, an adjudication against the partnership only draws into the proceeding the individual assets of the unadjudicated members, may well be doubted. **That question, however, is not now before us.**"

This same case was affirmed by the Supreme Court, 30 A. B. R. 244, and we find nothing in the Court's opinion in conflict with the above quotations from the decision of the same case in the Circuit Court, and we conclude, therefore, that the case of Francis v. McNeal does not decide the point in the instant case, for the Circuit Court says that this question was not before the court, and the decision of the Supreme Court contains nothing to the contrary.

The decision of the Circuit Court in the instant case is based almost solely upon the decision of the Supreme Court in Francis v. McNeal, and relies upon this authority for its ruling that the bankruptcy of the partnership ipso facto carried with it the bankruptcy of the individuals,

when we have seen that the decision in Francis v. McNeal states that this question was not before it.

Again, the Circuit Court in Francis v. McNeal 26, A. B. R. page 558, uses this language:

> "A partnership cannot be adjudged a bankrupt, in an involuntary proceeding, unless it has committed an act of bankruptcy. If the act charged be one involving insolvency, since every partner is liable in solido for all the partnership debts, the adjudication against the partnership must be based on allegations and proofs that the assets of its members, in excess of their individual debts, plus the assets of the partnership, are insufficient to pay the partnership debts. Otherwise, there is no partnership insolvency, notwithstanding the entity doctrine."

Now, there can be no bankruptcy of a partnership for insolvency unless, as stated in the above authority, it is alleged and proven that the individuals, as well as the partnership, are insolvent. In such a case there can be no adjudication of the partnership without an adjudication of the individuals, and of course individuals cannot be adjudicated unless they are before the court, and they were not before the Court in the instant partnership case.

The Supreme Court says in Francis v. McNeal, 30 A B. R. 247:

> "If it be said that the logical result of our opinion is that the partners ought to be put into bankruptcy whenever the firm is, as held by the late Judge Lowell, in an able opinion, Re Forbes (D. C. Mass) 11 A. B. R. 128 137) it is sufficient to answer that no such objection has been taken, but upon the contrary, Francis has consented and agreed to hand over his property according to the order of the Court."

Applying the above legal principle to the instant case, what is the proper conclusion to be reached? We conclude

that as the partnerships were declared bankrupts, without the partners being parties to said petition, that the District Court made no mistake, and that the general assignment of the partnerships did not involve insolvency, otherwise, the Court could not have adjudged the partnerships without the allegation and proof that the individuals were also insolvent.

We further conclude that there being no allegation or proof in the partnership proceedings of the insolvency of the individual partners, and they not being parties to such proceedings, that the Circuit Court could not properly hold, or even assume, insolvency of the partnerships and that it was fatal error upon such facts for it to decide that the bankruptcy of the partnerships carried with it the bankruptcy of the individuals.

(b) As the Circuit Court based its decision upon the case of Francis v. McNeal, it is essential that the court consider and contrast the difference between the facts of that case and the instant case.

In Francis v. McNeal "a creditors' petition was filed against the partnership and all its members, alleging that the individual respondents were partners in the said Provident Investment Bureau, that they were bankrupt individually and as a firm, and praying that they be adjudged to be bankrupt under the act of Congress." (26 A. B. R. 556).

In the instant case the petition was solely against the partnerships. The individuals were not parties defendant to the partnership petition, no process was had on them, and no answer filed by them. The partnerships assert in their composition offer that "no petition for bankruptcy has been filed by or against such individuals, and no discharge of such individual debts so listed as individual debts is sought." (Record page 31).

In Francis v. McNeal the partnership and two of its three members were adjudged bankrupts in one proceeding.

In the instant case the court refused in the proceedings against the partnerships, to adjudge the individuals bankrupts, and several months later the individuals on their voluntary petition were adjudged bankrupts.

In Francis v. McNeal there was no question involved as to the dissolution of a judgment; the sole question being whether the trustee could distribute individual assets, which were admitted to be partnership assets.

In the instant case the annullment of the Bank's judgment against the individuals is a vital issue.

In Francis v. McNeal there was a surplus from the individual assets to be applied on partnership debts and but one trustee.

In this case there was no surplus from the individual assets, and no occasion for the Trustee of the partnerships to assert any control over individual assets. Besides, the individuals were adjudicated on their separate voluntary petitions, and a trustee appointed by the individual creditors for the individual assets. The fact that the individual creditors by a separate and distinct vote named the same party as trustee that had been named by the partnership creditors, does not in the least change the situation.

From the above outline it may be seen that the decision of this court in Francis v. McNeal was based upon facts very different from the case at Bar, and that the Circuit Court erred in relying on said case when it held that the bankruptcy of the partnerships carried with it the bankruptcy of the individuals in the instant case, where the act of bankruptcy consisted in the partnerships making a general assignment.

(c) Notwithstanding our great respect for the learning of the Circuit Judges who decided this case, we feel constrained to point out in the opinion what seems conflicting. In the first part of the opinion the court assumes that the partnerships were insolvent, and reasons

"that insolvency of the partnership connotes insolvency of every member of it." In next to the last paragraph the court says: "The insolvency of the partnership at the date of the judgment seems to have been assumed in the court below. At any rate, no issue of solvency or insolvency at the date of the judgment appears to have been made. We express no opinion as to the existence of such insolvency or its effect."

We think we have pointed out clearly that the District Court was not called upon to assume insolvency, and we fail to find anything in the record that would justify the belief that the learned District Judge made any assumption of insolvency. It was not necessary for the adjudication of the partnerships, where there was a general assignment, that insolvency be assumed.

How the learned Circuit Court could decide this case as it did, and express "no opinion as to the existence of insolvency or its effect," we fail to understand. If we read the opinion correctly, it is based upon the insolvency of the partnerships, which it says the District Court must have assumed, and then proceeds to assume itself, that the individuals composing the partnerships were insolvent. Again, we fail to understand how the learned Judges of the Circuit Court could reach the decision they did on the appeal, basing their decision on the insolvency of the partnerships, when the individuals were not before the court, and when it was absolutely essential that it be alleged and proven that these individuals were insolvent as well as the partnerships.

How could the learned Judges of the Circuit Court assert that the learned Judge of the District Court must have assumed insolvency of the individuals (and there could have been no assumption of the insolvency of the partnerships without assuming the insolvency of the individuals), when the District Court stated in its opinion (page 68, record) that it had refused to adjudge the indi-

viduals composing the firm to be bankrupts, along with the partnerships; that no appeal was taken from this decision. and added, "The result is that the individuals composing the partnership have, in the partnership proceeding, never been adjudicated bankrupts."

Furthermore, it will be found on page 48 of the record, under "Agreed Statement of Facts From the Record," that the Bank, in its proof of debt filed against the partnerships, alleged "That W. L. Becker, Sr. and Jr., in their individual capacity are not bankrupts, and that no petition has been filed against them to have them adjudged bankrupt, and that as individuals they are not insolvent."

In the face of this emphatic allegation that the individuals were not insolvent, it would seem that the learned Judges of the Circuit Court of Appeals were in error when they state that "no issue of solvency or insolvency at the date of the judgment appears to have been made." Would it not have been more consonant with sound reasoning for the court to have held that as the Trustee failed to deny this allegation, that he was presumed to have admitted it?

B

THE TRUSTEE NEITHER ALLEGED NOR PROVED INSOLVENCY OF THE INDIVIDUAL PARTNERS, AND BOTH ARE ESSENTIAL TO DEFEAT BANK'S JUDGMENT

Second: The second error made by the learned Judges of the Circuit Court was in holding that the Bank's judgment against the individuals was ipso facto dissolved by the bankruptcy of the partnerships.

The learned Judge of the District Court says in his able opinion on page 68 of the record, that

> "Both the filing of a petition within four months and an adjudication thereon are necessary to nullify a lien of judgment. I read the pettiion which was filed

on August 6th, 1920, as praying only for an adjudication of the firm. But even if the petition be read as against both the firm and the persons composing it, still it was not, and never can be, followed by an adjudication against the individuals composing the firm. Hence the case is not within either sub section C. or sub section F. of Section 67, unless it be proper to say that an adjudication that a firm is a bankrupt is ipso facto an adjudication that each member of the firm is also a bankrupt. But there is no good reason supporting such contention, and a very strong reason against it."

Supplementing what the learned Judge has so forcibly stated, we may add that there is no doubt of the fact that the petition against the partnerships was against the partnerships alone, and that the individuals were not parties to this petition and that no process was had on them. Now the proposition is too fundamental to require the citation of authorities, that as the individuals were not parties to the partnership petition and no process was had on them, that the court could not pass upon or dispose of their rights in the individual property or the rights of their individual creditors. This position is made all the stronger if we bear in mind the admitted fact that there was no surplus from either estate.

That the petition against the partnerships was against them alone is conclusively established by two facts, namely, the following language in the opinion of the learned District Judge on page 68 of the record, when he says:

> "The refusal to adjudge the individuals composing the firm to be bankrupts was, if erroneous, an error which had to be appealed from within ten days from August 20th, 1920. (Section 25 B. A.)"

And, secondly, by the language used in the printed composition offered the partnership creditors, an extract

from which is found on page 31 of the record, where it is said:

> "No petition for bankruptcy has been filed by or against such individuals and no discharge of such individual debts so listed as individual debts is sought."

The Trustee is seeking to dissolve the Bank's judgment, and strange as it may seem, neither in his objections before the Referee, nor in his assignments of errors to the decision of the District Court, has he alleged insolvency or that the judgment was dissolved because it contravened any of the provisions of Section 67-c, or Section 67-f. For the convenience of the court we quote here a portion of each of these sections, so far as pertinent to the issue.

> 67-c. "A lien created by or obtained in or pursuant to any suit or proceeding at law or in equity, including an attachment upon mesne process or a judgment by confession, which was begun against a person within four months before the filing of a petition in bankruptcy by or against such person shall be dissolved by the adjudication of such person to be a bankrupt. (1) if it appears that said lien was obtained and permitted while the defendant was insolvent and that its existence and enforcement will work a preference, or (2) the party or parties to be benefited thereby had reasonable cause to believe the defendant was insolvent and in contemplation of bankruptcy."

> 67-f. "That all levies, judgments, attachments or other liens obtained through legal proceedings against a person who is insolvent at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt."

The authorities in construing the above sections hold, without exception so far as we are advised, that the party

asserting that a judgment is dissolved by bankruptcy must affirmatively allege and bear the burden of proving that said judgment contravenes the above provisions of the bankruptcy act, and failure to do so is fatal and the judgment will stand.

The Supreme Court of Appeals of Virginia has recently decided this question in an able opinion in the case of Jackson v. Valley Tie Co., 108 Va., 718, where the court says:

> "The essential to the invalidity of any lien falling within the purview and control of the statute is, that (a) the lienee must be insolvent; (b) the insolvency must have existed at the time the lien attached—or, as applied in this case, Girard must have been insolvent on September 13, 1906, the date of the levy of the attachment.
>
> "Loveland on Bankruptcy (3rd ed.), Sec. 192c, discussing paragraph 67-f. of the bankruptcy act, says: **'It is essential to bring a case within the prohibition, that it appears that the lien was obtained against a person who was insolvent at the time. If it does not so appear, the lien is valid. It is not sufficient that the levy caused insolvency.'** See also I Remington on Bankruptcy, Sec. 1460.
>
> "In Simpson v. Van Etten (C. C.), 108 Fed 199, the opinion of the court quotes with approval from Collier's work on Bankruptcy (3rd ed), page 434, as follows. 'Not all liens obtained against one afterwards and within four months adjudged bankrupt are deemed null and void. **It must appear that the person whose property is subject to the lien was insolvent at the time of the creation of the lien.** It is evident a lien might be obtained against one who is adjudged bankrupt within four months thereafter, but who was not insolvent at the time the lien was obtained. The act of bankruptcy and the insolvency might have occurred

at some period subsequent to the creation of the lien. If so, the adjudication of bankruptcy would in no way determine whether or not the party was insolvent at the time the lien was created.'

"The burden of proof of such insolvency as is meant in paragraph 67-f. is held in Re Chappell, (D. C.) 113 Fed 5455, to be upon the party alleging it as ground for abatement. The syllabus in that case is as follows: 'Where the trustee of one who was adjudicated bankrupt on his voluntary petition files a petition alleging that certain partial payments to creditors made within four months of filing the bankrupt's petition, were made while he was insolvent, and praying that such creditors be required to return such preferential payments before being permitted to receive dividends on their claims, and the creditors answered that the bankrupt was not insolvent at the time such payments were made, no presumption arises from the adjudication in bankruptcy that the bankrupt was insolvent for four months, or any period, before his petition was filed and hence it is incumbent on the trustee to prove the insolvency.'

"In the case at bar appellant, neither in his petition filed in the lower court, nor in any statement of his grounds of motion to abate the attachment, relied upon Girard's insolvency within four months previous to his being adjudicated bankrupt, but relied solely on the ground that Girard had been adjudicated bankrupt within four months after the attachment in this case was executed, and that, accordingly, the attachment and the levy thereof were null and void, under and by reason of the provisions of the bankruptcy act, and especially paragraph 67-f. * * * * * Under these conditions, the judgment of the court overruling the motion to abate the attachment was plainly right."

This decision was cited with approval in Newberry Shoe Co. v. Collier, 111 Va., page 290.

In the light of these authorities we feel fully justified in concluding that the Trustee has made out no case which would justify this court in dissolving the Bank's judgment.

C

THE TRUSTEE'S POSITION IS STRANGELY INCONSISTENT AND CONTRADICTORY.

We desire to discuss under the same heading the assignments of error numbers (3) and (4) in the attached petition.

These assignments are that, "Said court erred in holding that the Bank's judgment against the individuals had been dissolved, when it was more than four months old at the time said individuals were adjudicated bankrupts," and that:

"Said court erred in holding that in the bankruptcy proceeding against the partnerships, it was legal to go against the individual assets of the partners when the record showed plainly that all individual assets would be required for individual debts, without any surplus, and vice versa."

We contend that the **Trustee of the individual estates cannot be heard to complain of the Bank's judgment,** because the judgment was more than four months old when the individuals were adjudicated, and whatever powers he has as such Trustee must be claimed under and through this adjudication. It is readily apparent, therefore, how contradictory and inconsistent the Trustee's position is, when he is forced to admit that the individuals for whom he is Trustee were not adjudicated bankrupts until more than four months after the rendition of the judgment which he attacks.

Nor can he as Trustee of the partnerships be heard to attack the Bank's judgment. A judgment against individual assets, where there is no surplus above individual debts, is not a preference as against partnership creditors. It is alleged, admitted, and the record so shows, that all individual assets will be required for individual debts. On page 34 of Record, Sec. 18, it is said:

> "The partnership assets will not be sufficient to pay the partnership creditors, and the individual assets will not be sufficient to pay the individual creditors, if there is included their personal endorsements on partnership indebtedness."

Section 5-f. of the Bankruptcy Act, so far as pertinent to the issue, is as follows:

> "The net proceeds of the partnership property shall be appropriated to the payment of the partnership debts, and the net proceeds of the individual estate of each partner to the payment of his individual debts. Should any surplus remain of the property of any partner after paying his individual debts, such surplus shall be added to the partnership assets and be applied to the payment of the partnership debts."

Here are two trustees. The partnership trustee being directed to collect and distribute partnership assets to partnership creditors, and the trustee of the individual estates directed to collect individual assets and distribute to individual creditors. The partnership trustee was elected by partnership creditors, and the individual trustee by individual creditors. Suppose there had been separate trustees, and a contest had arisen as to their commission? Could it have been successfully contended that the partnership trustee could have administered the individual assets and deprived the individual trustee of his commission? It is manifest that he could not.

The trustee stands before this court seeking as trustee for the partnerships, and, by separate and distinct ap-

pointment, as trustee for the individuals, to have dissolved the Bank's judgment. Now the very dual attitude of the trustee is contradictory and inconsistent. If the bankruptcy of the partnerships carried with it the bankruptcy of the individuals, why didn't he, as trustee for the partnerships alone, object to the Bank's judgment? It is evident that he did not consider that his appointment as trustee for the partnerships conferred any authority over individual property; otherwise, he would not have accepted the separate appointment as trustee of the individual estates.

The trustee should be consistent. The dual manner in which he proceeds negatives any idea of individual assets having passed under his control upon the bankruptcy of the partnerships.

We conclude, therefore, that neither as Trustee of the individuals nor as Trustee of the partnerships can he consistently, legally or successfully attack the Bank's judgment.

(b) The Trustee again occupies an inconsistent position brought about by the learned Judge of the District Court declining to adjudicate the individuals in the partnership proceeding. The court was consistent in refusing to so adjudicate the individual partners, if for no other reason than that they were not parties to the petition against the partnerships, were not served with process, and had committed no act of bankruptcy. But there were other reasons which moved the Court to so decide, and in its opinion this striking language, so applicable to the point we are now urging, is used:

> "It only remains to be said that a party who seeks an advantage from a final and unappealable decree of court must rely on such decree as it is written or not rely on it at all."

The Trustee cannot claim under the order in one breath and against it in another. He cannot claim the

sweet and disregard the bitter. It is wholly inconsistent and contradictory for him to contend that the bankruptcy of the partnerships carried with it the bankruptcy of the individuals, when several months later the individuals were declared bankrupts on their voluntary petition and he was elected their Trustee in said proceeding. If the bankruptcy of the partnerships was ipso facto the bankruptcy of the individuals, then a vain and foolish thing was done when the individuals were adjudicated on their voluntary petitions, and the Trustee is a party thereto by accepting appointment as Trustee under such an adjudication of the individuals. Will this court presume that the learned District Court by its solemn order adjudicated the individuals to be bankrupt on their individual petitions when they were already in bankruptcy in that court?

To hold that the bankruptcy of these partnerships for making a general assignment ipso facto carried with it the bankruptcy of the individuals would be to lay down a principle, the evil effects of which would be most far reaching. To illustrate, Mr. Rockefeller might be one of a partnership of ten, and the partnership might make a general assignment and be thrown into bankruptcy in order to save costs and for equalization. According to the contention of the Trustee, Mr. Rockefeller would at once be a bankrupt, and all of his vast properties would pass under the control of the bankrupt court.

D

OTHER ERRORS COMPLAINED OF

The remaining assignments of error in the petition have necessarily been brought into the foregoing discussion, and, lest this brief assume too great a length, we will not now do more than allude to them.

The motion to dismiss and the demurrer, we respectfully submit, should have been sustained by the learned Judges of the Circuit Court, and we invoke a careful con-

sideration of these at the hands of this Honorable Court.

As to the assignment that the learned Judges of the Circuit Court erred in not sustaining the decision of the learned Judge of the District Court, when he held that his order in refusing to adjudicate the individuals bankrupts was res judicata, we respectfully submit that this assignment is well taken. In his opinion the learned Dustrict Judge says that he refused to adjudicate the individual partners to be bankrupt along with the partnerships, and that this order not having been appealed from within ten days, was final. The correctness of his conclusion seems unassailable. The Bank is asserting a judgment against the individuals, whom the District Court, by its order, has said were not bankrupts within four months, and this order is final.

Fortified by a final decree of the United States District Court, and a solemn judgment of a State Court, which has not been attacked, by proper allegations and proof that the individuals were insolvent at the date of the rendition of said judgment, or that there was reasonable cause to believe that they were insolvent, and that the judgment would work a preference against creditors of the same class, isn't the Bank's judgment unassaliable, and should not the decision of the District Court have been affirmed by the Circuit Court? We respectfully submit that it should.

WHEREFORE, IT IS RESPECTFULLY SUBMITTED THAT THE PETITION SHOULD BE GRANTED AND A WRIT OF CERTIORARI ISSUED AS PRAYED FOR.

JAS. D. JOHNSTON,
Counsel for Petitioner.

Supreme Court of the United States

OCTOBER TERM, 1924

No. 234

LIBERTY NATIONAL BANK OF ROANOKE, VIRGINIA, PETITIONER

vs.

JAMES A. BEAR, TRUSTEE IN BANKRUPTCY OF THE ESTATES OF W. L. BECKER, SR., and W. L. BECKER, JR., PARTNERS, ETC., AND AS TRUSTEE OF W. L. BECKER, SR., and W. L. BECKER, JR., BANKRUPTS, RESPONDENT.

On writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

BRIEF OF COUNSEL FOR RESPONDENTS.

Marvin J. Andrews—Publisher—Salem, Va.

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BRIEF OF COUNSEL FOR RESPONDENTS.

For the sake of convenience, we will in this brief designate the Petitioner as the Bank and the Respondent as the Trustee.

STATEMENT OF THE CASE

The proceedings had in this matter are chronologically stated at such length in the petition to superintend and revise (beginning at page one of record) and also in the sum-

mary of evidence (beginning at page twenty-two of record) that we deem it unnecessary in this statement to again set out in detail all of the facts and proceedings had in the matter, except to state that on July 20th, 1920, the Bank recovered in the Corporation Court for the City of Roanoke, Virginia, a judgment againt W. L. Becker and W. L. Becker, Jr., partners trading as the Roanoke Provision Company, and also against W. L. Becker and W. L. Becker, Jr., individually, which judgment was duly docketed on the 31st day of July, 1920, in the Clerk's Office of said Court. This judgment was for $5,566.05, with interest, attorneys fees and costs. The judgment was recovered on an ordinary homestead waiving note, made by W. L. Becker and the Roanoke Provision Company, and endorsed by W. L. Becker and W. L. Becker, Jr., individually, the Roanoke Provision Company being a partnership composed of W. L. Becker and W. L. Becker, Jr.

On August 6th, 1920 an involuntary petition in bankruptcy was filed in the Clerk's Office of the District Court of the United States for the Western District of Virginia, by Runkle & Company and others, against W. L. Becker and W. L. Becker, Jr., partners trading as W. L. Becker & Company and the Roanoke Provision Company, the petitioner alleging that an act of bankruptcy had been committed on August 4th, 1920, by the execution by the partnerships of a general Deed of Assignment to a Trustee for their creditors, the petitioner alleging that both partnerships were insolvent.

On August 7th, 1920, W. L. Becker and W. L. Becker, Jr., filed in said Clark's Office their joint answer to the petition, admitting its allegations, this answer being signed by them in their individual capacities, and in which they waived process and admitted all the allegations of the petition.

On August 20th, 1920, the partnerships of W. L. Becker & Company, and the Roanoke Provision Company were adjudged bankrupts and the case referred to R. Q. Mosby,

Referee, who directed the bankrupts to appear, and on August 23rd, 1920, entered an order reciting the adjudication of the partnerships an bankrupts and directing that they file the requisite schedule in partnership bankruptcy proceedings on or before the 2nd day of September, and also directing that they file, on or before said date, lists of their individual assets and liabilities, which schedules and lists were duly filed and which showed conclusively that both partnerships and the individuals composing them were insolvent beyond all question. (Record Pages 11, 12, 23 and 24).

Several meetings of the creditors were had and on September 25th, 1920, the partnership offered to their creditors a composition of 20 per cent. Various meetings of the creditors were had on this offer of composition, at which meetings a majority in number and amount of creditors accepted the offer of composition, but the Bank opposed it, counsel for the Bank at the meeting stating that the bank was opposed to the composition on the ground that the real estate owned by the individuals would be mortgaged in order to raise the money to pay the composition offered.

Further proceedings were had on this offer of composition from time to time until November 29th, 1920, on which date the partnerships amended their offer of composition. Various meetings of the creditors were then held from time to time to consider this amended offer of composition until finally at a meeting held December 23rd, 1920, a majority of creditors in number and amount voted favorably on the composition, but the Bank again renewed its objection on the same ground, and finally on January 3rd, filed in writing the same objection to the composition. Further proceedings were had in the matter from time to time before the referee, and finally the matter was heard before the District Court on April 20th, 1921, when said court entered an order sustaining the objections of the Bank to the composition, and rejecting the offer.

Since the offer of composition made by the partnerships had been acted upon unfavorably on April 27th, 1921, W. L. Becker, Sr., and W. L. Becker, Jr., filed their voluntary petitions in bankruptcy with the requisite schedules, and on April 28th, 1921, they were adjudged bankrupts individually.

On May 16th, 1921 respondent, James A. Bear was elected Trustee for the two partnerships and for W. L. Becker, Sr., and W. L. Becker, Jr., as individuals, and then proceeded with his administration of all four estates.

During these proceedings which had extended from August 6th, 1920, until April 27th, 1921, the bank filed two proofs of debt, the first on December 23rd, 1920, alleging that the Roanoke Provision Company was indebted to it in the sum of $5,566.99 with interest and certain attorneys fees, but that said bank had received no security for this debt. The second proof which was filed on January 6th, 1921, was also filed against the Roanoke Provision Company, alleging the same debt and alleging further that since the bank's judgment was against both the partnership and the individuals composing it, and was over four months old as to the individuals that the bank would claim that the judgment was a valid lien on the individual real estate of the partners. In addition to these two proofs on May 31st, 1921, the bank filed two proofs of claim, one against W. L. Backer, Sr., and another against W. L. Becker, Jr., alleging practically the same facts as were alleged in the proofs filed on January 6th, 1921, and in these two proofs again asserted that the judgment was over four months old as to the real estate of the individual partners, and was hence a secured claim. It will thus be observed that not until after four months had elapsed after the filing of the petition against the partnership did the bank by any pleading assert that this judgment was a prior or secured claim.

The Trustee sold the entire partnership assets, which only brought the sum of $908.08 (Record Page 11), this

amount being insufficient to pay even the costs of administration, and no dividend will be declared to the partnership creditors. The Trustee also sold the individual assets of W. L. Becker, Sr., bringing the sum of $11,786.00, from which a mortgage indebtedness of $2708.36 was paid; the assets of W. L. Backer, Jr., bringing the sum of $8832.00 from which a mortgage indebtedness of $3257.68 was paid, thus leaving $8077.64 payable to the individual creditors of W. L. Becker, Sr., and $5574.32 payable to the individual creditors of W. L. Becker, Jr., which after the payment of the costs of administration, will not be sufficient to pay their individual indebtedness. (Record page 11).

The case was heard before the referee on these various proofs of claim of the Bank and objections by the Trustee, (Record Page 2), to the allowance of the same as secured claims against the proceeds of sale of the real estate owned by the individual partners. On the issue thus raised on December 9th, 1921, the referee filed a written opinion (Record Page 38) and entered an order, (Record Page 45) declaring that said claims were disallowed as secured claims, but were allowed as unsecured claims. To this order of the referee the Bank prosecuted an appeal and petition for review to the District Court, who by an order entered May 23d, 1922 (Record Page 53) reversed the order of the referee and allowed the claims of the Bank as secured claims against the proceeds of sale of the real estate of the individual partners.

To this decision of the United States District Court the Trustee prosecuted an appeal to the United States Circuit Court of Appeals for the Fourth Circuit, who reversed the order of the District Court (Record Page 63). To the decision of the Circuit Court of Appeals, whose opinion is found at page 60 of the Record, this court awarded a writ of certiorari on which the cause is now before this Court.

BRIEF OF THE ARGUMENT.

I.

The filing of the petition against the partnerships and adjudication thereon carried into bankruptcy the members of the partnerships as individuals, because:

(a) The partnerships and the individual members were in fact insolvent.

(1) Petition against partnerships alleged insolvency (Record page 23).

(2) District Court adjudicated partnerships bankrupts (Record page 16).

(3) Partners admitted insolvency (Record page 23).

(4) Referee in summary of evidence found that neither the assets of partnerships nor of the individuals sufficient to pay their debts (Record page 26, paragraph 18).

(5) Pleadings filed by Bank admitted insolvency (Record pages 19, 47, 49 and 50).

(6) Stipulation of counsel as to contents of lists filed by individuals partners shows insolvency (Record page 11).

(b) The adjudication of the partnership was in effect an adjudication of the individual members.

Section 5 of the Bankruptcy Act,
General Order in Bankruptcy No. 8,
Francis v. McNeal, 228 U. S. 695; 57 Led. 1029,
In re: Meyers, 98 Fed. 976,
Dickas v. Barnes, 140 Fed. 849,
Vacarro v. Security Bank, 103 Fed. 436.

II.

The assets of the individual partners being drawn into

bankruptcy by the adjudication of the firm, Congress intended that such assets be distributed in acordance with the principles and rules of the Bankruptcy Act which prevent the perfection of liens thereon, preferences, or an inequitable marshalling of the partnership and individual estates, which is shown by:

(a) The privisions of the Act and its construction by the Federal Courts,

Section 5 of the Bankruptcy Act, Clauses b through g, In re: Meyer, 98 Fed. 976,

Dickas v. Barnes, 140 Fed. 849

Black on Bankruptcy (1922 Ed.), page 110

Francis v. McNeal (3rd Circuit), 186 Fed. 481

Vacarro v. Security Bank, 103 Fed. 436.

(b) The construction placed upon the Act by this Court.

Francis v. McNeal, 228 U. S. 695; 57 Led. 1029

Miller v. New Orleans Acid Fertilizer Co., 221 U. S. 496

General Order in Bankruptcy No. 8.

III.

Litigation was pending over the composition offered by the partnership and pending decision of this question no liens could be perfected against property of the individual estates which would prevent an equitable distribution of the property of the several estates. (Record pages 24 and 25).

IV.

The assignments of error should be overruled.

(a) The first assignment of error is without merit for the reasons stated under Section I, II and III of the Brief of the Argument.

(b) The second assignment of error is without merit for the reasons states under Sections I, II and III of the Brief of the Argument and for the further reason that Sections 67 c and 67 f of the Bankruptcy Act are to be considered in connection with the other provisions of the Act.

(c) The third, fourth, fifth, sixth and seventh assignments are without merit for the reasons states under Sections I, II and III of the Brief of the Argument and for the further reasons:

(1) The Trustee in this case is the representative of the four estates which are now in bankruptcy (Record page 26, paragraph 4).

(2) There are other creditors of the individuals estates who have the right to object to the Bank's claim being a secured claim, even if it be assumed that the Bank is classified as an individual creditor. (Record page 26, paragraph 18, Record page 11).

ARGUMENT.

Briefly the contention of the Bank in this case is that its judgment which was recovered both against the partnership and the individuals composing it, and which was docketed in the proper State Clerk's Office on July 31st, 1920, is a lien on the property of the individuals, because said individuals were not adjudicated bankrupts until April 28th, 1921, some eight months later. The Bank taking the position that a partnership is a legal entity distinct from the individuals composing it, and that the adjudication of the firm as a bankrupt had no effect upon liens acquired on the properties of the individual partners.

On the other hand, the Truestee contends that the partnership composed of exactly the same individuals having been adjudicated a bankrupt on August 20th, 1920 (less than one month from the docketing of the Bank's judgment) that this adjudication of the partnership brought the es-

tates of the individuals composing it under the jurisdiction of the bankruptcy court to such an extent that no liens could be perfected thereon.

The foregoing respective contentions of the parties are for the Trustee summarized in the Brief of Argument, while those of the Bank are contained in 7 assignments of error appearing on pages 6 and 7 of the petition for certiorari. Since, however, the questions presented by the Brief of Argument and the assignments of error are so closely related, we believe it will be conductive to clearness and certainly brevity to discuss the assignments of error along with the reasons advanced by us for the affirmance of the decision of the learned Circuit Court.

I.

THE PARTNERSHIP AND ITS MEMBERS WERE IN FACT INSOLVENT.

In the case at bar the petition in bankruptcy against the partnerships alleged that they were insolvent. All the members of the partnership on the following day filed their answer and **admitted** the allegations of the petitions. (Summary of evidence, paragraphs 2 and 3, Record page 23).

Twenty-one days thereafter the District Court **adjudicated** the partnerships bankrupt. In addition to this specific allegation of insolvency appearing in the petition, the admitted fact in the answer filed to the petition and the adjudication which was made on the petition and answer (which we contend conclusively established the existence of an act of bankruptcy involving insolvency) there is in the record other abundant evidence of the fact that the partnerships were insolvent. The Referee in the summary of evidence (Paragraph 18, Record page 26) found that the partnership assets will not be sufficient to pay the partnership debts and the individual assets will not be sufficient to pay the individual creditors if there is included their per-

sonal endorsements on partnership indebtedness. Counsel for the Bank has admitted the same facts. In his petition for appeal from the decision of the Referee (Record page 47) it is alleged that "when the bankrupts knew that it would take more than all of their individual assets to pay their individual creditors." Again in the petition for review of the order of the Referee (Record page 49) counsel for the Bank allege that "the petitioner says that the entire individual assets will not be sufficient to pay the individual creditors and that there will be no surplus from the individual assets to be distributed among the partnership creditors." In the same pleading, in speaking of the composition, counsel alleges: "When the bankrupts knew that it would take more than all of their individual assets to pay their individual creditors." To the same effect are the allegations of the sworn, separate proofs of debt filed against W. L. Becker, Sr., and W. L. Becker, Jr., which are the allegations on which the Bank is now seeking a recovery and which specifically allege that the entire individual assets of W. L. Becker, Sr., and W. L. Becker, Jr., will be required to pay their individual debts and there will be no surplus of said individual assets to be applied to partnership debts. Furthermore, the absolute insolvency both of the partnerships and the individual members thereof is clerly established by the other evidence appearing in the record, especially the stipulation found at page 11.

Notwithstanding the fact, however, that we submit that the record in the case shows clearly that the insolvency of both the partnerships and their members, it will be borne in mind that in neither the proceedings before the Referee, nor before the District Court was this question of insolvency raised. Not until Counsel for the Bank filed in the District Court his motion to dismiss the appeal granted to that Court was this question of insolvency raised and we submit that the question not having been raised until the record had been made up and filed in the Circuit Court, that now the objection comes too late and cannot now be heard.

The adjudication in this case having been upon an act of bankruptcy where the elements of insolvency were present, it follows that:

THE ADJUDICATION OF THE PARTNERSHIP WAS IN EFFECT AN ADJUDICATION OF THE INDIVIDUAL MEMBERS.

(1) The Bankruptcy Act, Section 5, Clause B, through G, provides how both individual and partnership estates are to be administered for the benefit of the creditors.

Clause G provides that:

> "The court of bankruptcy which has jurisdiction of one of the partners may have jurisdiction of all of the partners and of the administration of the partnership and individual property."

Clause F provides that:

> "The net proceeds of the partnership property shall be appropriated to the payment of partnership debts and the net proceeds of the individual estate of each partner to the payment of his individual debts; should any surplus remain of the property of any partner after paying his individual debts such surplus shall be added to the partnership assets and be applied to the payment of partnership debts."

Clause G provides that:

> "The court may permit the proof of the claim of the partnership estate against the individual estates and vice versa, **and may marshal the assets of the partnership estates and individual assets so as to prevent preferences and secure the equitable distribution of the property of the several estates." (Bold face type ours).**

The intention of Congress by the enactment of Section 5, Clause B through G was to afford facilities for the equit-

able distribution of the several estates and to this end it granted to the Supreme Court of the United States the right to prescribe a procedure in bankruptcy. The Supreme Court in General Order No. 8 provides:

> "Such partner shall be required to file a schedule of his debts and inventory of his property in the same manner as is required by the Act in cases of debtors against whom adjudication of bankruptcy shall be made."

In this case the referee followed the conventional procedure. Record Page 17). He directed that the two partners, who alone composed the partnership should file lists of their respective assets and liabilities. This the partners did on August....., 1920, (Record Page 23) and from that moment, with their consent, their estates were under the jurisdiction of the bankruptcy court for distribution of their properties among the several classes of creditors.

The intention of the bankruptcy act was not to create new rights between the partners and their creditors, but was to so marshal and so administer the several estates in bankruptcy as would leave intact the common law rights of all parties concerned. As was said in the case of In re: Meyer, 98 Fed. 976:

> "By the provisions of Section 5 of the bankruptcy act a partnership during the continuance of its business or after its dissolution and before final settlement of its business may be adjudged a bankrupt and jurisdiction of all the partners and the administration of the partnership and individual property is conferred upon any court of bankruptcy having jurisdiction of one of the partners."
>
> 'We are of the opinion that it is the scheme of these provisions to treat the partnership as an entity,

which may be adjudged a bankrupt by voluntary or involuntary proceedings, irrespective of any adjudication of the individual partners as bankrupt, and upon an edjudication to draw to the administration the individual estates of the partners as well as the partnership estate, and marshal and distribute them according to equity."

To the same effect is the case of In re: Stokes, 106 Fed. 312, which holds under the Bankruptcy Act of 1898, Section 5:

"The adjudication of a partnership as a bankrupt draws to the court of bankruptcy for administration the individual estates of the partners though they are not adjudged bankrupts individually and such court may require an assignee for the benefit of creditors of one of the partners to surrender the assigned property to the Trustee of the partnership by a summary order, since such assignee does not hold adversely but in the right of his assignor."

In the case of Dickas vs. Barnes, 140 Fed. 849, certain members of a partnership objected to the court taking charge of their estates on the ground that they were wage earners and farmers and not subject to proceedings in bankruptcy. The court, however, held that one who becomes a member of a partnership may become subject to the exercise of the powers **of a court of bankruptcy where the resources of the partnership will be gathered to satisfy the claims of the creditors.** That these are **consequences of the partnership relation,** and are not derived from the bankruptcy act. That if bankruptcy does not supervene the rights of the parties will be worked out by a court of general jurisdiction and the partner would be a party, a **necessary party to the record** so that his liability for the firm debts could be enforced, and that in the bankruptcy court he may be brought before the court for the same purpose. See also Black on Bankruptcy, (1922 Edition), Section 110.

(2) **This court has so construed the Act.** This court in the case of Fancis vs. McNeal, 228 U. S. 695; 57 L. Ed., Page 1029, where the issue raised was whether Francis was a partner in the firm which was a bankruptcy. Pending the determination of this question the court entered an order confirming a certain agreement entered into between the parties, whereby Scott, Counsel for Francis, would collect certain rents on his (Francis') individual property and hold the same subject to future determination of this question. Later the Referee found Francis to be a partner and McNeal, who had been appointed Trustee, filed a petition asking leave to take over the individual property of Francis, which upon a hearing was so ordered by the Referee. Later the court affirmed the order of the Referee directing the Trustee to take over Francis' individual property and later Mr. Justice Holmes again affirmed the decision of the lower court and after stating the facts, held:

(1) That the liability of a partner for partnership debts was primary and direct and not collateral, as that of a surety, regardless of whatever priority there may be in marshalling their assets. That this liability is created by the common law, regardless of the Bankruptcy Act.

(2) That ordinarily a partnership cannot be insolvent with one of its members solvent and that the banqruptcy law has not established principles inconsistent with this rule. On the contrary that Section 5, Clausese a through g contemplate that **both partnership and individual estates are to be administered in bankruptcy and this is true, notwithstanding the fact that** for some purposes these Clauses recognize the entity theory. That the only exception contemplated by the Bankruptcy Act is Clause "h" of Section 5, will allow a solvent partner of a firm where some, but **not** all, are in bankruptcy to administer the estate, and this clause does not import that the partnership can be in bankruptcy and some of the partners out. That the necessary and natural meaning of this language goes no further.

(3) That if the partnership and individual estates together are not enough to pay the partnership debts, the rational and certainly not forbidden thing to do is to administer the min bankruptcy.

(4) That so far as Vaccaro vs. Secnity Bank, 103 Fed. 436, is in conflict with the majority decision in re Bretanshaw 157 Fed. 363, that it (meaning the Vaccaro case) is sustained by the stronger reasons and is correct.

We have cited and have stated what we consider this case to hold for the purpose of showing that the Supreme Court of the United States has not carried the entitiy theory to the extent which the District Court has carried it, and we submit that this case clearly holds that Clauses 'a' through 'g' of Section 5, clearly contemplte that both estates must be administered in bankruptcy and the natural coisequence of this rule necessitates that upon the filing of a petition in bankruptcy against a partnership, in the very nature of things, and in order to properly marshal the assets and liabilities of the two estates, the individual property must be taken into bankruptcy and held by this court free from any one obtaining liens against it which would prevent the marshalling of assets and result in a preference. In fact, as we read this devision, it holds that it is impossible in the nature of things for the partnership to be in bankruptcy with its partners solvent, and the only time that the entity theory applies is in a cese where there is a solvent partner, who may then by authority granted him under the Act, administer the estate. If there is a solvent partner, as is pointed out in this case, the firm is not insolvent, and there is really no occasion for bankruptcy for as Mr. Justice Holmes says at Page 1030:

> "A judgment could be got and the partnership debt satisfied on execution out of the individual estates."

In fact we are unable to conceive of a case where a partnership could be insolvent if its members, or any one of

them, are solvent, which the learned Circuit Court and this Honorable Court have so decided.

To meet this decision of this Honorable Court the Bank contends that the decision of this court in Francis vs. McNeal, 228 U. S. 695; 57 L. Ed. 1029, is not applicable to this case, because the decision of the same cese in the United States Circuit Court of Appeals for the 3rd Circuit, 186 Fed. 481; 26 American Bankruptcy Reports 560, proceeded upon the theory that in that case the court was dealing with a situation where the partnership had been adjudicated upon a petition involving insolvency; that in the case at bar the adjudication of the partnership did not involve insolvency because it was upon a general deed of assignment, great stress being laid on the fact that in the case at bar the adjudication of the partnerships was based on the fact that they had executed a general deed of issignment. In other words, the contention is that the decision of the Circuit Court of Appeals in Francis vs. McNeal was based upon an adjudication involving insolvency, but that in the case at bar the adjudication of the partnerships did not involve such question; hence the decision of neither the Circuit Court nor this court in Francis vs. McNeal applies.

In Francis vs. McNeal the cause was heard upon the petition of the Trustee and the order directing Francis to deliver his property to the Trustee, the answer of Francis and the opinion of the Circuit Court. The Trustee's petition averred that a creditors petition had been filed against the partnership and all its members, alleging that they were bankrupts individually and as a firm, and praying that they may be so adjudicated. That said creditors petition was filed was admitted by the answer of Francis, and the court at page 482 of 186 Federal Reporter, said:

> "Consequently we must assume that the act of bankruptcy upon which the adjudication against the partnership was made was one involving insolvency of the partnership."

It appears therefore that the facts in the instant case and in Francis vs. McNeal afford striking similarity and that although the case at bar, as was in the case of Francis vs. McNeal, the act of bankruptcy alleged was on the execution of a general deed of assignment, it is clearly shown by the record in this cause that the act of bankruptcy was one where all the elements of insolvency were present and was one involving insolvency. It appears to us, therefore, there can be no distinction between the two cases.

The argument next advanced by the Bank is that there can be no bankruptcy of a partnership for insolvency unless it is alleged and proven that the individuals as well as the partnerships were insolvent, that there can be no adjudication of the partnerships without an adjudication of the individuals, who cannot be adjudicated unless they were before the court, as they were not in the instant case. As we interpret this argument, the contention is that they could be no adjudication of a partnership in bankruptcy unless at the time of the adjudication of the partnership it appeared by an inquiry instituted for that purpose that the individuals were also insolvent. In other words, unless a petition were pending against the individuals composing the partnership, process was served on them and by such inquiry it were determined that their assets were not sufficient to meet their liabilities, then no adjudication could be had against the partnership. In this argument, however, counsel compjletely overlooks the unquestioned principle that the partners are liable **in solido** for the debts of the firm and that the adjudication of the firm as bankrupt is bound in the nature of things to be an adjudication of the individual partners as insolvent. If the partnership was insodvent, the members were bound to be. That was the very point in Francis vs. McNeal. There the firm and some of its members had been adjudicated, but Francis had not been, and the question arose, did he have to turn over his individual property to the Trustee. The court held that he did and in summarizing its decision stated that in involun-

tary proceedings where the act of bankruptcy charged is one involving insolvency of the partnership, there can be no adjudication against the partnership unless it and all of its members are insolvent, and that in such a case, though the adjudication be against the partnership **only**, or against the partnership **and some, but not all**, of its numbers, the assets of **all** members are drawn into the proceedings for administration.

As the learned Judges of the Circuit Court in their opinion in this case (Record page 61) have well said:

> "It is imposible for a partnership to be insolvent when the partners individually, or any one of them, is solvent, because every partner is individually liable for the debts of the partnership. A proceeding in equity to marshal assets of a partnership would necessarily be dismissed upon a showing that the complaining creditor could collect his debt in an action at law from one of the partners. Under a creditors bill in a court of equity against a partnership every creditor of the partnership has the right to prove his claim against the individual members of the firm and have it paid from the individual assets, if there be a sufficient surplus over the individual liabilities. Pomeroy Equity Juris. (4th Ed.), Sections 2371, 2372."

A further distinction between these cases is attempted to be made in that in the instant case none of the partners were adjudged bankrupts, while in Francis vs. McNeal some of them were. There is, however, no real distinction. It is true that in the instant case the District Court did refuse to adjudicate any of the individuals, but its decision was based upon a narrow construction of the act to the effect that a partnership was an entity for all purposes, while in Francis vs. McNeal both in the District Court and in this Court the real issue was whether the bankruptcy of the firm was in effect an adjudication of Francis, or at least brought his property before the court. The Circuit Court and this

Court so held that the adjudication of the firm brought in the individual property of Francis, because the petition was against the firm and hence against all of its members, but no distinction was made in either court because Francis, whose estate was involved, was not adjudicated upon the original petition, the sole question being the binding effect of the adjudication against the **partnership** and **some, but not all, of its members**, it appearing that the question of insolvency was involved. It is true that in Francis vs. McNeal there was no issue as to the validity of a lien, as in the instant case, but the underlying reason for the basic principle was present; that the members of the firm and their property were in bankruptcy, subject to the rules of administration in bankruptcy.

II.

THE ASSETS OF THE INDIVIDUALS BEING DRAWN INTO BANKRUPTCY BY THE BANKRUPTCY OF FIRM, THEY WILL BE ADMINISTERED AS THE ACT REQUIRES.

If then, Francis vs. McNeal, supra, and the other cases just cited are authority for the propsition that it was the intention of Congress to bring both estates before the bankruptcy court and certainly such was the construction of the act by Mr. Justice Holmes in Francis vs. McNeal, supra, then surely it expected the estates to be administered in accordance with the provisions of the Bankruptcy Act, and not in accordance with some foreign principle or fiction of the law to the effect that a partnership is an entity distinct from the members which compose it, at least, this we submit would be the natural inference in the absence of an express enactment.

But there is an express enactment. Clause "F" provides how how the net proceeds of the property of a partnership and individuals shall be divided among their respective creditors and Clause "G" provides that:

"The Court may permit the proof of the claim of the partnership estate against the individual estates and vice versa, **and may marshal the assets of the partnership estate and individual assets so as to prevent preferences and secure the equitable distribution of the property of the several estates." (Bold face type ours).**

The stated intention of this clause is to secure an equitable distribution and prevent preferences. They must be construed so as to carry into effect the purposes of the Act, and this contention is sustained by this Court in the case of **Miller vs. New Orleans Acid & Fertilizer Co., 221 U. S. 496.**

In that case a member of a partnership had conveyed certain of his property to the defendant Miller in settlement of a debt which Miller hald against him. Under the State Law of Louisana this constituted a preference which could be attacked by both partnership and individual creditors. Certain partnership creditors filed a bill under the State Law which gave them a lien upon the funds so recovered. More than four months after the debt had been paid, but within four months of the institution of the suit to set it aside, the partnership was adjudged a bankrupt, but the individual members were not so adjudged. On his motion as allowed by Section 67-F of the Bankruptcy Act the Trustee intervened in the suit in the State Court as plaintiff in place of the creditors and proceeded with the suit claiming the right to recover the fund, and enforce the lien.

The highest court of Louisana having held the payment to be a preference under the State Law Miller applied for, and obtained a writ of error to this Court. In this Court the question was raised whether the partnership members could complain of the payment in full of a partner's individual debt out of his individual estate since under the method of administration provided by the Act the individual creditors must be paid in full before any of the individual estate could be applied to the partnership debts. The Court held:

(1) That notwithstanding the fact that under the Law of Louisana partnership creditors shared with individual creditors in the distribution of the individual estate of the partnership this rule was superseded by the adjudication of the firm bankrupt, and the bankruptcy act was controlling on this question.

(2) That the Trustee was entitled to recover the fund for the benefit of other individual creditors if there should be any, and that the method of distribution of this fund among the individual creditors was a question solely for the bankruptcy court to determine.

(3) But that if it appear in the proof of the claim against the individual estate that Miller is the only individual creditor, he will be entitled by way of distribution to the full amount paid in by him **because of the method of administration ordained by the Bankruptcy Act.**

This case seems to hold that the lien of the three partnership creditors on the fund was avoided upon the filing of the bankruptcy petition against the partnership within four months, although it was not shown that other partnership creditors would be prejudiced, and that if a partnership creditor obtains a lien upon the estate of an individual partner within the four months, that this lien is a preference if it interferes in any way with the **manner and method of distribution fixed by the Act.**

If then we are correct in our contention that the Act confers jurisdiction over both estates as an initial proposition, and either expressly or impliedly provides the method of distribution then it undubitably follows that it was not the intention of Congress to allow aliens to be perfected during the pendency of the proceedings.

III.

LITIGATION PENDING.

The record shows consclusively that from the time of

the filing of the partnership petition, and the filing of the list of assets and liabilities of the individual partners that all of the creditors regarded both estates as before the court for settlement. The partners themselves so regarded it as they submitted to the jurisdiction of the court, and filed lists of their assets and creditors which showed them to be insolvent. They then filed an offer of composition. This they had the right to do under the provisions of the Act. The creditors had the right to determine whether they would accept the composition. The formalities of the bankruptcy law as to the offer and acceptance of the compromise had to be complied with. Both the bankrupts and the creditors of both estates had the right under the provisions of the law to conduct these proceedings in a legal and orderly manner without liens being perfected during the pendency of the proceedings. Naturally these proceedings required time, and both the partners and the creditors of both estates entered into this litigation over this question in good faith, believing that both estates were before the court, and that they had time to dispose of the question in the manner prescribed by law.

The first offer of composition was filed on September 25th, 1920, and was considered at a number of meetings of the creditors from time to time until November 29th, 1920, at which date an amended offer of composition was made, and this was then considered from time to time and was before the referee, and the District Court until the 20th day of April, 1921, thus the time from September 25th, 1920, until April 20th, 1921, the period of time in which the Bank's judgment became four months old was consumed by active litigation and there were no indications until January 6th, 1921, that the Bank would claim a lien upon the individual assets. It is true that Counsel for the Bank stated that he objected to the individual assets being mortgaged to raise money with which to pay the partnership creditors, but not until this pleading of January 6, 1921, was filed were the other creditors advised that the Bank did not

regard the individual assets as being before the Court. Clause "G" provides that the Court may marshal the assets so as to secure an equitable distribution. If under these facts and circumstances the Bank is allowed to prevail, the provisons of Clause "G" will be entirely ignored and there will not be an equitable distribution. Especially is this true in view of the fact that although the debt which is now being asserted by the Bank was reduced to judgment both against the firm and the partners, it is in fact a partnership debt. The Referee found that all or substantially all of the money which was advanced on the notes given to the Bank, and upon which it obtained its judgment was expended and used for partnership purposes; that very little, if any, of the money was used for individual purposes of the partners. (Record Page 26). This finding of the Referee is presumptively correct. Collier on Bankruptcy, 12th Edition, page 699, and cases cited.

The partnership assets will not be sufficient to pay the partnership creditors, nor will the individual assets be sufficient to pay the individual creditors. (Record Page 26). In fact, the entire sale of the partnership assets brought only the sum of $908.08 (Record page 11), which will hardly pay the costs of administration, must less the many thousands of dollars which the partnership owes.

The lists of assets and liabilities of W. L. Becker, Sr., show that he is individually indebted as an endorser and otherwise in the sum of approximately $30,666.94 and that after the sale of all his individual property, and the payment of the mortgage indebtedness thereon, only $9,077.64 will be available for distribution to his individual creditors. The list of W. L. Becker, Jr., show that he is indebted as an endorser and otherwise in approximately the sum of $30,336.-12, while the sale of his individual assets after the payment of the mortgage indebtedness thereon will leave available for distribution among his individual creditors only the sum of approximately $5,556.32. Thus as the situation now stands after the payment of the costs of administration less

than $14,000.00 will be available for distribution among the individual creditors, and nothing will be available for distribution among the partnership creditors. (Record Page 11).

Under these conditions we submit that if the claimant is allowed to recover from the proceeds of sale of the individual estates every dollar of a debt which is in fact a partnership debt there will be no **equitable marshalling** of the several estates, but in fact a most **inequitable hardship** will be imposed upon the other individual creditors of the individual partners. The act is dual in its operation. On the one hand it operates **in rem** providing for the distribution of the **estates according to well defined principles.** On the other hand it operates **in personam** granting persons adjudged bankrupts a discharge from their debts if they comply with the law in reference to discharge. In this case the question before the Court is not one of discharge, but a question of the proper distribution of the **estates,** and if as we contend the estates of the individuals are brought into the bankruptcy court for distribution, then we submit that the Trustee's title to the individual estates relates back to the filing of the partnership petition, and as the Bank's judgment was recovered within four months of that time the lien thereof is annulled.

IV.

THE ASSIGNMENTS OF ERROR SHOULD BE OVERRULED.

We have heretofore already discussed to a certain extent these assignments of error and the argument of counsel for the Bank thereunder in our discussion of the general principles applicable to the case and while we do not think the situation merits a further general discussion of assignment No. 1, we do desire to state briefly our views of some

of the contentions made under the remaining assignments of error.

(b) Sections 67 "c" and 67 "f" are to be considered and construed in connection with the other provisions of the Bankruptcy Act.

The argument of Counsel for the Bank in connection with these two sections of the Bankruptcy Act is to the effect that the Trustee has not alleged insolvency or that the judgment was dissolved because it contravened any of the provisions of these Sections, quoting them and citing authorities to the effect that the party asserting that a judgment is dissolved by bankruptcy must affirmatively allege and bear the burden of proving that the judgment contravenes these two provisions of the Act, and failure to so allege and prove insolvency renders the judgment unassailable.

Having fully discussed the condition of the record on the allegations and proof of insolvency, we will not discuss these questions further, but we submit that these two sections do not have the application to the case that Counsel for the Bank contends. We have found no authority and certainly Counsel for the Bank have cited none which would indicate that it was the intention of Congress to give greater efficacy to these two sections than to any other section of the act. We do not think that Congress intended that the validity of liens in connection with partnership bankruptcies should be solely controlled by these two sections and that Section 5, clauses "b" through "g," should be ignored or made subservient to Sections 67 "c" and 67 "f", especially when Section 5 deals directly with partnership bankruptcies.

As we have heretofore contended, we believe that insolvency has been abundantly alleged and proven, but irrespective of the proper solution of that question the contention of the Bank disregards the fact that the petition against the partnership was filed within four months from

the recovery of the judgment, the effect of which we have argued at length and which, we earnestly contend, renders the estates of the partners subject to administration in bankruptcy in accordance with the cardinal principles of the act and in accordance with the provisions of Section 5, Clauses "b" through "g."

C

THE TRUSTEE REPRESENTS ALL FOUR ESTATES

(1) Counsel for the Bank contends that the Trustee of the individual assets cannot be heard to complain of the Bank's judgment because the same was more than four months old when the individuals were adjudicated, and whatever power he has as such Trustee must be claimed under and through this adjudication. The court will bear in mind that the record shows that due to the fact that litigation was pending over the composition offer, no Trustee was elected for the partnerships until after the adjudication of the individual partners, whereupon at the first cerditors meeting after the District Court had rejected the offer of composition respondent was elected Trustee of the estates of both partnerships and as Trustee of the individual estate of W. L. Becker, Sr., and that of W. L. Becker, Jr. Hence when the Trustee objected to the allowance of the Bank's claim as a secured claim, he objected both in the capacity of Trustee for the partnerships and as Trustee for the individuals, and it is for the protection and in the interest of an equitable distribution of all four estates, free from preferences, that he conducts this litigation. We are unable to see any force in the centention that the Trustee is claiming through the adjudication of the individual estates, because as a matter of fact, he claims as the representative of all four estates and there is nothing inconsistent in his attempts to have the assets of all four estates marshalled so as to prevent preferences and to secure an equitable distribution of the property of the several estates, and this is true

regardless of the fact that the judgment was four months old when the individuals were adjudicated, the effect of which we have already discussed at length.

C

THERE ARE OTHER CREDITORS OF THE INDIVIDUAL ESTATES WHO OBJECT TO THE BANK'S CLAIM.

(2) The next contention advanced is that the Trustee of the partnerships cannot be heard to attack the Bank's judgment against the individual assets where there is no surplus above the individual debts and the same is not a preference as against partnership creditors. This same contention is advanced under the first assignment of error on page 17 of the brief and with apparently no regard for logical sequence appears at various places throughout his brief. We will now discuss this contention as it appears under this assignment of error and elsewhere in the brief of counsel for the Bank.

It will be remembered that in this case the debts scheduled by the individual members are classified as follows:

1st class debts for which W. L. Becker, Sr., was alone liable	$ 5,372.00
Debts for which W. L. Becker, Jr., was alone liable	6,527.85
2nd class debts for which both were liable with other makers and endorsers	3,900.00
3rd class debts for which both were liable as endorsers for the partnership	27,066.00
Total debts on which there is individual liability	$42,865.85

The debts of the first class aggregate $11,899.85; those of the second and third classes aggregating $30,966.00. The

sale of all the individual assets of both partners brought $20,618.00, from which a total prior uncontested mortgage indebtedness of $5,966.04 was paid, leaving for destribution $14,651.96. The total debts of either class plus the bank's judgment of $5,566.05, aggregate more than the total amount available for distribution, and in making the foregoing calculation, the cost of administration and the many thousands of dollars of purely partnership demands are not taken into account. Nor is the sum of $508.08 which was all that was realized from the sale of the partnership assets. The Referee found that the debt of the bank on which the judgment in question was rendered was incurred for partnership purposes, but regardles of this, or in which class the bank's debt is placed, it is evident that in any event, there will not be an amount sufficient to pay any creditor in full. Thus the solution of the question in this case favorably to the contention of the Trustee is of vital importance to all of the creditors, those holding purely personal demands, as well as those holding the notes of the partnership endorsed by the individual members, and that the bank's judgment in fact results as a preference against both classes of creditors.

The illustration attempted by counsel for the bank, on page 27 of his brief, as to the unfortunate position in which Mr. Rockefeller would be placed if some partnership of ten of which he were a member, would for reason sufficient unto themselves execute a deed of assignment and be thrown into bankruptcy, is not applicable. In such contingency, if Mr. Rockefeller were solvent he would merely exercise his right as a solvent partner to administer the affairs of the partnership. On the other hand, if the partnership were insolvent, the rule in Frances vs. McNeal, supra, would apply, and Mr. Rockefeller would himself be insolvent, and his affairs would be thrown into bankruptcy to be administered in accordance with the provisions of the Act.

CONCLUSION.

In conclusion, it is respectfully submitted:

(1) That the record in this case shows that the partnership and its members were insolvent; that regardless of this question, no such issue was raised by the claimant Bank before the Referee, or the District Court, and that now such contention will not be heard in this Court.

(2) That the filing of the petition against the partnership and the adjudication thereon was in effect an adjudication of the individual members, or at least carried their assets into bankruptcy. That the assets of the individual members being in bankruptcy, it was the intention of Congress as interpreted by this Court in Frances vs. McNeal, supra, that the assets of both estates be distributed in accordance with the method of distribution ordained by the Bankruptcy Act, so as to prevent preferences and to secure an equitable distribution of the different estates among the respective creditors.

(3) That this being the proper interpretation of the Act, it was the intention of Congress that its provisions should be carried into effect in such manner as to allow the Court to administer the properties of the various estates untrammeled by litigation or proceedings which would result in the perfection of liens against either estate.

(4) That none of the errors assigned by the Bank or the argument of counsel thereon state any valid reasons why the decision of the learned Circuit Court is not proper.

It is therefore respectfully submitted that the decision of the United States Circuit Court of Appeals for the Fourth Circuit should be affirmed.

G. A. WINGFIELD,
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JAMES A. BEAR,
HARVEY B. APPERSON,
of Counsel for Respondents.

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AUTHORITIES REFERRED TO

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Supreme Court of the United States

OCTOBER TERM, 1923

No. 238

The

LIBERTY NATIONAL BANK OF ROANOKE, VIRGINIA, A CORPORATION,

PETITIONER

vs.

JAMES A. BEAR, TRUSTEE IN BANKRUPTCY, of W. L. BECKER & COMPANY, and ROANOKE PROVISION COMPANY, and W. L. BECKER, SR., and W. L. BECKER, JR., INDIVIDUALLY,

RESPONDENT

PETITIONER'S REPLY BRIEF

To the Honorable the Chief Justice and Associate Justices of The Supreme Court of the United States

In this brief the Petitioner is referred to as the Bank and Respondent as Trustee.

STATEMENT OF THE CASE

In the main, the Trustee's brief correctly states the facts, but we object to the following recitals as misleading:

On page 2, in the 2nd paragraph from the bottom, it is said that the joint answer of the partners was "signed

by them in their individual capacities." This is not borne out by the record or facts. The individual petition of August 6th, 1920, was against the two partnerships alone, and they only were adjudicated bankrupts in that proceeding. The Court expressly refused in the petition against the partnerships to adjudicate the individual partners. See, Record, page 51, where Judge McDowell says:

> "The order of adjudication of Aug. 20th, 1920, declares the partnership to be a bankrupt and distinctly fails to declare the individuals composing the partnership to be bankrupts."

So, however signed, the answer was the answer of the partnerships.

ARGUMENT

We will reply to several points in the Trustee's brief in the same order that they appear:

I.

On page nine, the Trustee says:

> "The partnership and its members were in fact insolvent."

This is the first time the Trustee has said anything about insolvency. He is attacking a judgment and seeking to avoid it, and he must both allege and prove insolvency. The Trustee's objections on page 21 of the Record make no averment of insolvency of either the firm or the individuals.

Black on Bankruptcy 3rd Ed. Sec. 595, page 1229, says:

> "The trustee in bankruptcy, assailing a judgment or transfer as preferential, must assume the burden of showing the insolvency of the debtor by satisfactory and sufficient evidence."

Collier, 8th Ed. page 650, says:

> Insolvency "is a question of fact, and the burden of showing it is on him who alleges it * * * it must be alleged and found as a fact."

The individual partners must have been proven to have been insolvent **at the time the Bank's judgment was recovered** to render it a voidable preference. Black On Bankruptcy, 3rd Ed. page 1250, says:

> "One thing absolutely essential to constitute a voidable preference is that the debtor should have been insolvent at the time it was given, and the trustee has the burden of proving this fact. The mere fact that the debtor was afterwards adjudged bankrupt raises no presumption that he was insolvent at any given time within four months prior to the filing of the petition. And the giving of a confession of judgment does not of itself raise a presumption of insolvency."

No where has the trustee made any allegation that the individual partners were insolvent when the Bank's judgment was recovered, and this omission is fatal.

The quotations taken by the Trustee from the Bank's petitions for appeal and review, appearing on page 10 of his brief, were made many months after the recovery of the Bank's judgment, and in no proper sense can they be held to apply to conditions at the date of the recovery of the judgment. They are, therefore, not relavant or pertinent.

At the bottom of page 10, counsel for the Trustee has fallen into a grievous error in attempting to shift the burden by asserting that the objection of insolvency "comes too late and cannot now be heard." Black on Bankruptcy, Sec. 614, says:

> "In an action to set aside or recover a transfer, incumbrance or payment, alleged to constitute an unlawful preference, the burden of proof is on the trustee in bankruptcy to establish the existance of

each of the statutory elements of a voidable preference."

We have shown, as we think, that the Trustee has not borne his burden.

On page 11 of Trustee's brief it is asserted, under bold type, "that the adjudication of the partnership was in effect an adjudication of the individual members."

> This statement is in direct conflict with the Court's order adjudicating the partnerships and refusing to adjudicate, at the same time, the individual members of the firm (Record, page 51). The Trustee by argument seeks to attain what the Court declined by its order, and attempts to accomplish by indirection, what the Court refused directly. Such a position seems all the more strange, when we remember that all the powers the trustee for the partnerships has are derived from the selfsame order.

At the top of page 12, Trustee quotes a part of General Order No. 8 in support of his argument, that the adjudication of the partnerships was in effect an ajudication of the individual members. The point is not well taken. This order was copied from one drawn under the Acts of 1867, where the partnership was not an entity, and where the only way to put a partnership into bankruptcy was to adjudicate the individuals. The law is entirely different under the Act of 1898. We quote from In re Samuels and Lesser 30th A. B. R. page 297:

> "It is said that General Order No. 8 controls, but that is by no means clear. The order was copied from one drawn under the Act of 1867, which did not recognize the firm entity, and it does not assume the possibility of a firm adjudication without adjudication against the partners separately."

In the middle paragraph, same page, it is said:

> "And from this moment, with their consent, their estates were under the jurisdiction of the bankruptcy court for distribution of their property among the several classes of creditors."

We do not think the record shows that there is any proper foundation for this utterance. The written offer of compositions made by the partnerships distinctly says that **"the rights of the individual creditors are not herein sought to be, and will not be, affected by this composition if confirmed," and that no discharge of individual debts was sought** (Record page 24, Sec. 8).

Again, in the Bank's proof of debt (Record page 19) it is averred:

> "That while a receiver was appointed by the Judge of this court for the partnerships on August 7th, 1920, said receiver had no authority or control over any of the individual assets and property of the individuals of the partnerships, and at no time took control, or attempted to take control, of any of the individual assets and property, but all of said individual assets and property remained in the possession and exclusive control of the individuals, to-wit, W. L. Becker, Sr., and W. L. Becker, Jr., and said individuals asserted their exclusive possession and control of said individual property by using and enjoying the two residences, which are part of the individual assets, with their families, and by giving a deed of trust on their individual real estate, without the consent or order from any court to do so, with which to secure money to offer as a composition to their creditors."

This averment is no where denied by the Trustee, and, therefore, is an admitted fact.

It is, therefore, respectfully submitted that the Trustee erred when he made the statement above quoted, and as a matter of fact, the individual assets were not before the court for distribution from the filing of the lists.

The Trustee cites the case of DICKAS v. BARNES 140 Fed. 849; 15 A. B. R. 566. This case when properly considered, in the light of the facts of the instant case ~~now considered, in the light of the facts of the instant case~~, is an authority for the Bank. The syllabus says:

> "Upon the adjudication of an unincorporated company in a jurisdiction where it is held to be a partnership the court of bankruptcy may take possession of and administer the property of one of the members whom it could not adjudge bankrupt, **so far as necessary in the settlement of the partnership assets."**

In the Bank's brief attached to the petition, on page 14, FRANCIS v. McNEAL 26 A. B. R. 560, is quoted where the court says: that "it may well be doubted."

> "Whether, where the act of bankruptcy charged against a partnership is one that does not involve insolvency, an adjudication against the partnership only draws into the proceeding the individual assets of the unadjudicated member."

FRANCIS v. McNEAL was decided later than the Dickas case, and was affirmed by this Honorable Court, and, therefore, is the controlling decision. We feel fully warranted, therefore, in asserting that the Dickas case, Meyer case and Stokes case, cited on pages 12 and 13 of Trustee's brief, are not authorities in point.

However, let us consider briefly the Dickas case. Particular attention is directed to the language underscored above, "so far as necessary in the settlement of the partnership assets." For the sake of argument, we might admit that where a partnership alone is adjudicated, that the court could reach out after the individual assets, if there was a surplus above individual debts, but even if this be granted, the true principal would limit the administration to the language above, "so far as necessary in the settlement

of the partnership assets." How could the court properly go further, and what reason would there be for it to undertake to go further?

We quote In re SAMUELS & LESSER, 30 A. B. R. page 296, where the court says:

> "It seems to me obvious justice that his whole separate estate ought not to be drawn into the bankruptcy court for administration unless that be true and so far, indeed, Judge LANNING felt bound to go in FRANCIS v. McNEAL, supra, to avoid unjust results. But though the worst aspect of the doctrine would be relieved by its limitation to cases where the partner was individually insolvent, it is none the less always ~~obvious~~ obnoxious in principle, since the partner's estate ought not to be drawn into bankruptcy at all unless he has committed an act of bankruptcy. It is true that he avoids the stigma of the name, but there may be more concerned than that to his creditors. For instance, does the administration of the separate estate presuppose that the firm acts of bankruptcy invalidate execution liens of the individual creditors? If not, the bankruptcy court will administer the separate estate without regard to sections 67c or 67f. If, on the other hand, the firm acts of bankruptcy do affect the status of the individual creditors, it is a clear anomaly under the law."

In the instant case it is admitted, and no where denied: that **there will be no surplus from the individual assets to go to the partnership creditors**; that the individual partners had committeed no act of bankruptcy; that they were not parties defendant to the petition against the partnerships; that the court refused to adjudicate the individuals along with the partnerships; that the trustee of the partnerships was elected by the partnership creditors alone, and that after the Bank's judgment was more than four months old the individuals were adjudicated on their voluntary petition and a trustee was elected by the individual creditors to administer the individual assets.

Under these facts, how could the trustee for the partnerships legally or with propriety assert any claim against the individual assets, or the right to administer the same? Any effort on his part to do so would be unwarranted, and he would be exceeding his authority.

The trustee devotes more than three pages of his brief beginning on page 14, to a discussion of the case of FRANCIS v. McNEAL, 228 U. S. 695, 57, L. Ed., page 1029; 30 A. B. R. 247, also reported 26 A. B. R. 558. We have discussed this case in the brief accompaning the petition, on pages 16 and 17, and deem is unnecessary to make further reference thereto.

On page 17 of brief, the Trustee again discusses the question of insolvency, becoming confused, and reaching a false conclusion in saying "that the adjudication of the firm as bankrupt is bound in the nature of things to be an adjudication of the individuals partners as insolvent."

It is true that a partnership cannot be insolvent unless the individual partners are insolvent, and it is likewise true, that where the alleged act of bankruptcy involves insolvency, that the partnership cannot be adjudicated unless the individuals are parties to the petition, and they, as well as the partnership, are shown to be insolvent, but it is absolutely incorrect to say that in the instant case adjudication of the partnership was an adjudication of the individual partners to be insolvent. The act of bankruptcy committeed by the partnerships was the first part of the fourth act of bankruptcy, to-wit, having "made a general assignment for the benefit of his creditors." The partnerships having made a general assignment, the act of bankruptcy was complete, whether they were solvent or insolvent, and the District Judge was not called upon to inquire into the solvency or insolvency of the partnerships or the members thereof. The insolvency was non-essential to the adjudication of the partnerships.

It is manifest, therefore, that counsel for the trustee, and the learned Judges of the Circuit Court are in error in concluding that the adjudicating of the partnerships meant an adjudication of the individuals also.

But where the act of bankruptcy committed by the partnership does not involve insolvency, the partnership may be adjudged a bankrupt without adjudging the individuals. Such is the instant case. To hold that in every case where a partnership makes a general assignment, and thereby commits an act of bankruptcy, the partnership cannot be adjudicated without ipso facto adjudicating the individuals will completely wipe out the entity doctrine in such cases, and will be a great injustice to individuals composing partnerships. To so hold would be a distinct step backward, for while under the bankruptcy act of 1867, a partnership was adjudicated by adjudicating the individuals, such is not true under the act of 1898. Collier 13th Ed. Vol. 1, page 233, says:

> "A partnership now is something other than under the law of 1867. There the words, were, 'two or more persons who are partners in trade.' Now it is a 'partnership' that 'may be adjudged a bankrupt.' This phrasing coupled with other clauses, has led to the doctrine that a partnership is in bankruptcy a legal entity—a joint relation where the idenity of the members has been lost—and that, therefore, the individuals and the partnerships are entities separate and distince from each other'."

> "Application Of Doctrine—A partnership being a distinct entity, it owns its property and owes its debts apart from the individual property of its members which it does not own, and apart from the individual debts of its members which it does not owe. Under this principle a partnership as an entity may be adjudged to be a bankrupt, irrespective of any adjudication against the individual members."

II.

We refrain from discussing the Trustee's Division No. 2, on page 19 of his brief, as this has been answered, as we believe, in the discussion of other points.

III.

Under Division No. 3, under the head of "Litigation Pending" the Trustee rehearses much that has been stated in previous parts of his brief, and rather invokes the affirmance of the decision of the Circuit Court because of the unfortunate plight of the partnership creditors. This line of argument is in the nature of a request to ignore well established legal rules and principles, and wipe out the Bank's judgment without proper and sufficient allegation being made, and proof introduced by the Trustee. Later in this brief will be set out the essential allegations for the avoidance of a judgment, with none of which the Trustee has complied.

The Trustee for the partnership creditors has no ground to complain if the Bank collects its judgment from the individual assets, because it is admitted that there will be no surplus from the individual assets. Furthermore, partnership creditors and individual creditors are not in the same class and the Bank would be getting no preference over a creditor of the same class. If the Bank collects every dollar of its debt it doesn't take a penny from the partnership creditors. What ground have they or their trustee, therefore, to complain?

The trustee for the individual creditors cannot complain, because, when the individuals were adjudicated the Bank's debt was more than four months old. So the plea for equity comes with poor grace from the Trustee for the partnerships or the Trustee for the individuals.

Again, on page 24, Paragraph 1, Trustee says that "the bankruptcy act is dual in its operation. On the one hand

it operates in rem * * * * . On the other hand in personam granting persons adjudged bankrupts a discharge from their debt," etc.

This line of argument, while somewhat plausible, is not logical. It recoils upon the Trustee. He seems to argue that this court should by indirection destroy the Bank's judgment by taking away the assets to which it has attached through the Bank's diligence, while the Court would be powerless to grant the judgment debtors a discharge. The Bank's judgment cannot be annulled and avoided unless the individuals have been adjudged bankrupts within four months, and if the judgment can't be avoided except in this manner, the assets out of which it could be collected cannot be taken away from it. So, the Trustee has asked the court in the partnership proceedings to take away the individual assets from the lien of the Bank's judgment, when he is forced to admit that in that proceeding a discharge could not be granted to the individuals.

Where an individual is in bankruptcy and makes proper application according to law he can get his discharge, but no one would be so bold as to contend that in the partnership proceedings in this case the individuals could have gotten a discharge, for it is admitted that they were not before the court at that time. Hence, it follows that this line of argument from the standpoint of the Trustee becomes absurd, but from the viewpoint of the Bank it becomes a very potent reason why the bankruptcy of the partnerships in no sense annulled or avoided the Bank's judgment against the individuals.

IV.

Under Division 4, page 24, of Trustee's brief it is said that "the assignment of error should be overruled," and that Sections 67c and 67f are to be construed in connection with the other provisions of the bankruptcy act. This is true, but in so doing the court will not ignore and completely wipe

out said sections, which it would have to do if it followed and adopted the Trustee's argument.

CONCLUSION

Throughout this case the Trustee for the partnerships and the trustee for the individuals has failed to conform to the essential requirements, both in allegation and proof, which all of the authorities hold are necessary to avoid a judgment. Black On Bankruptcy, 3rd Ed. page 1246 says:

> "The four essential allegations of the complaint are (1) that the bankrupt was insolvent when the alleged preference was given; (2) that it was within four months prior to the bankruptcy; (3) that the effect of the enforcement of the judgment or transfer will be to enable the defendant to obtain a greater percentage of his debt than any other creditor of the same class; (4) that the defendant had reasonable ground to believe that a preference would result from the transaction. The omission of any one of these allegations will render the complaint demurrable."

A comparison of the above four necessary and required allegations, in any proceeding seeking to avoid a judgment, with the objections of the Trustee as found on pages 21 and 22 of the record, will disclose the fact that he has failed to aver any one of the four. The Bank's motion to dismiss the Trustee's appeal, and its demurrer thereto, (Record, pages 56, 57 and 58) should therefore, have been sustained by the learned Judges of the Circuit Court of Appeals, and their failure so to do, seems clearly to be error, for which this court will reverse said decision.

The Bank recovered three judgments; one against the Roanoke Provision Company (A partnership composed of W. L. Becker, Sr., and Jr.,); another against W. L. Becker, Sr., individually; and a third against W. L. Becker, Jr., individually on a negotiable note made jointly by W. L. Becker, Sr., and the Roanoke Provision Company, and endorsed by

W. L. Becker, Sr., and W. L. Becker, Jr. The individuals were sued individually, as well as in their partnership capacity. Process was served on them in their individual capacity, and judgment rendered and docketed in the same manner (Record page 22, Sec. 1, Summary Evidence).

These separate judgments against the individuals could have been avoided by the filing of a petition in bankruptcy by or against the individuals within four months. No petition in bankruptcy was filed within the four months, and it is clear, therefore, that the learned Judge of the District Court was correct in holding that the judgments against the individuals had not been avoided. The court says:

> "The wording of the order of adjudication was not an inadvertance, but was the result of the construction I have put on the Bankrupt Act since my first connection with it. The refusal to adjudge the individuals composing the firm to be bankrupt was, if erroneous, an error which had to be appealed from within ten days from August 20th, 1920 (Sec. 25 B. A.). As no appeal was taken within the time allowed by law, neither this court nor any other court can now correct the supposed error. The result is that the individuals composing the partnership have, in the partnership proceedings, never been adjudged. Both the filing of a petition within fouth months, and an adjudication thereon are necessary to nullify a lien of a judgment."

It is therefore respectfully submitted, that the decision of the Circuit Court of Appeals is erroneous and should be reversed.

JAS. D. JOHNSTON,
Counsel for Petitioner.

Counsel for Parties.

LIBERTY NATIONAL BANK OF ROANOKE, VIRGINIA, *v.* BEAR, TRUSTEE IN BANKRUPTCY OF THE ESTATES OF W. L. BECKER, SR., AND W. L. BECKER, JR., PARTNERS, ETC.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 238. Argued April 25, 1924.—Decided May 26, 1924.

1. To invalidate the lien of a judgment under § 67f of the Bankruptcy Act, he who challenges it must show not only that the judgment was recovered within four months prior to the filing of the petition in bankruptcy, but also, by pleading and proof, that the judgment debtor was insolvent when the lien was obtained. P. 368.
2. Assuming (but not deciding) that an adjudication of the bankruptcy of a partnership necessarily adjudges the partners, as individuals, bankrupt, it raises no presumption that they were insolvent for any period before the petition in bankruptcy was filed. P. 370.
3. Nor does the fact that sales of the property of the partnership and partners, made some months later by the trustee in bankruptcy, did not realize enough to pay for the partnership or individual debts, establish that the partners were insolvent at a time anterior to the filing of the bankruptcy petition. *Id.*

285 Fed. 703, reversed.

CERTIORARI to a decree of the Circuit Court of Appeals which reversed a decree of the District Court allowing the claims of the above named bank, as secured claims, in bankruptcy.

Mr. James D. Johnston for petitioner.

Mr. Harvey B. Apperson and *Mr. James A. Bear*, with whom *Mr. G. A. Wingfield* was on the brief, for respondent.

MR. JUSTICE SANFORD delivered the opinion of the Court.

This case, which arises in proceedings in bankruptcy, involves claims by a judgment creditor to liens upon the real estate of the bankrupts.

On July 20, 1920, the Liberty National Bank recovered a judgment in a Virginia court against the Roanoke Provision Co., a partnership composed of the two Beckers, and against the Beckers individually. This judgment—which was duly docketed in the Judgment Lien Book and on which execution was issued—was under the laws of Virginia a lien upon the real estate of the judgment debtors. Code of 1919, § 6470.

Thereafter, on August 6, an involuntary petition in bankruptcy was filed in the Federal District Court against the Company, as a partnership composed of the two Beckers, alleging that it had committed an act of bankruptcy on August 4 by executing a general assignment for the benefit of creditors, and that it was insolvent. There was no allegation that the Beckers were individually insolvent or had committed acts of bankruptcy; and no prayer that they be adjudged bankrupt individually. They filed a joint answer admitting the allegations of the petition. On August 20, the Company, as a partnership composed of the two Beckers, was adjudged bankrupt by the District Judge; but they were not adjudged bankrupt as individuals. Thereafter, pursuant to an order of the referee, the Company and the Beckers filed schedules of their respective assets and liabilities.

In April, 1921—more than nine months after the recovery of the judgment—the Beckers filed separate voluntary petitions in bankruptcy; and each was adjudged bankrupt as an individual. Bear, the trustee in the partnership proceeding, was appointed trustee of their individual estates.

Thereafter the Bank filed proofs of claim on its judgment against the separate estates of the Beckers, alleging that it constituted a lien upon their individual real estate and was entitled to priority as such. The trustee filed objections to the allowance of these prior claims, on the ground, among others, that by virtue of the proceedings against the Company he had been vested with title to the property of the individual partners as well as that of the partnership, as of the date of the filing of the petition in bankruptcy against the partnership, and that as the judgment against the individual partners had been recovered within four months prior to the filing of that petition it could not, under the provisions of the Bankruptcy Act, be enforced as a lien upon their separate estates. He did not aver, however, that either the Company or the Beckers were insolvent at the time the judgment was recovered.

The referee, holding that the liens created by the judgment upon the separate properties of the Beckers had been "annulled" by the proceedings under the petition against the partnership, disallowed the claims of the Bank as secured claims and allowed them as unsecured claims merely.[1] This order of the referee was reversed by the District Judge, on the ground that as the order of adjudication had merely adjudged the bankruptcy of the Company, and not the bankruptcy of the Beckers individually, the lien of the judgment upon their separate estates had not been "nullified." The trustee was thereupon granted an appeal to the Circuit Court of Appeals. The Bank moved to dismiss this appeal upon the ground, among others, that the trustee had not alleged, either in his objections to the allowance of its claims or elsewhere, that the Beckers were insolvent at the time the judgment was

[1] The referee at the same time disallowed another claim of the Bank to a lien upon the real estate of the partnership; but no steps were taken by the Bank to review his order in this respect.

recovered, nor had such insolvency been proven; and that allegation and proof of their insolvency at the time the lien of the judgment attached was "absolutely essential." The Circuit Court of Appeals—without ruling on this motion—reversed the decree of the District Court upon the ground that the "adjudication of the partnership was necessarily an adjudication of the bankruptcy of the individuals composing it, and that . . . the lien of a judgment obtained within four months of the filing of the petition against the partnership was lost by the adjudication." 285 Fed. 703. This decision was apparently based upon § 67f of the Bankruptcy Act,—upon which the trustee had relied at the hearing before the referee[2]—although no reference to it is made in the opinion; it being evidently assumed by the court that under that section a judgment lien obtained within four months prior to the filing of a petition in bankruptcy is dissolved by the subsequent adjudication of the bankruptcy of the judgment debtor, without reference to his solvency or insolvency at the time the lien was obtained.[3] This writ of certiorari was then granted. 261 U. S. 612.

Upon the question whether the adjudication of the bankruptcy of a partnership involves an adjudication of the bankruptcy of the individual partners, there appears to have been a diversity of opinion in the lower federal courts. The decision in *Francis* v. *McNeal*, 228 U. S. 695, upon which the Circuit Court of Appeals chiefly relied, did not involve a determination of this direct question. And we do not find it necessary to determine it now; since, even if the adjudication of the bankruptcy

[2] This appears from a statement in the opinion of the referee.

[3] The Court said: "The insolvency of the partnership at the date of the judgment seems to have been assumed in the court below. At any rate, no issue of solvency or insolvency at the date of the judgment appears to have been made. We express no opinion as to the existence of such insolvency or its effect." (p. 706.)

of the Company operated as an adjudication of the bankruptcy of the Beckers individually—which we do not intimate—nevertheless, in the absence of either pleading or proof as to their insolvency when the Bank recovered its judgment, there is no ground under § 67f of the act for annulling the lien thereby acquired upon their property.[4]

This section provides: "That all levies, judgments, attachments, or other liens, obtained through legal proceedings against *a person who is insolvent*, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt. . . ." It applies only to liens obtained in legal proceedings against a person who was "insolvent" when the lien was acquired. If the debtor was then solvent the lien is not invalidated although it was obtained within four months prior to the filing of the petition in bankruptcy. *Taubel-Scott-Kitzmiller Co.* v. *Fox*, 264 U. S. 426. To invalidate the lien the person challenging it must show that the debtor was insolvent when it was obtained. *Stone-Ordean-Wells Co.* v. *Mark* (C. C. A.), 227 Fed. 975, 978; *Martin* v. *Oliver* (C. C. A.), 260 Fed. 89, 93; *Simpson* v. *VanEtten* (C. C.), 108 Fed. 199, 201; *Keystone Brew'g Co.* v. *Schermer*, 241 Pa. St. 361, 365; *Jackson* v. *Valley Tie Co.*, 108 Va. 714, 718; *Newberry Shoe Co.* v. *Collier*, 111 Va. 288, 290; *Severin* v. *Robinson*, 27 Ind. App. 55, 61. And see *Re Richards* (C. C. A.), 96 Fed. 935; *Re Chappell* (D. C.), 113 Fed. 545; *Re Community Stores* (D. C.), 282 Fed. 328. Such

[4] There is neither averment nor proof bringing the case within § 67c or any other provision of the act relating to the annulment of prior liens.

insolvency must be both alleged and proved. *Stone-Ordean-Wells Co.* v. *Mark, supra,* p. 978.

In the present case the trustee neither alleged the insolvency of the Beckers at the time the judgment was recovered and became a lien on their properties, nor proved such insolvency. If the admission in their joint answer to the petition filed against the partnership that the Company was insolvent, was intended as an admission of their individual insolvency, it was, at the most, an admission of such insolvency on August 6, when the petition in bankruptcy was filed,[5]—a very different thing from insolvency at the time the judgment was recovered—and, in any event, would not have been binding on the Bank, which was not then a party to the bankruptcy proceeding. So, if the adjudication of the partnership as a bankrupt can be regarded as adjudging the insolvency of the individual partners at the date the petition in bankruptcy was filed—which we do not determine—such an adjudication, for like reason, would not be binding upon the Bank. *Gratiot State Bank* v. *Johnson,* 249 U. S. 246. And, generally, an adjudication in bankruptcy in no way determines whether or not the debtor was insolvent at the time a lien was obtained through legal proceedings against him; there being no presumption arising from the adjudication that he was insolvent for any period before the petition in bankruptcy was filed. *Keystone Brew'g Co.* v. *Schermer, supra,* p. 365; *Jackson* v. *Valley Tie Co., supra,* p. 719; *Newberry Shoe Co.* v. *Collier, supra,* p. 291. Nor does the fact that the sales of the partnership and individual properties made some months later by the trustee did

[5] The act of bankruptcy alleged, namely, the making of a general assignment on August 4, did not involve a question of the insolvency of the partnership at that date; the making of a general assignment being an act of bankruptcy without reference to the solvency or insolvency of the debtor. Bankruptcy Act, § 3a(4).

not realize enough to pay either the debts of the partnership or the debts of the individual partners, respectively, establish the insolvency of the partners at the time the lien was obtained.

There being neither allegation nor proof by the trustee of the insolvency of the Beckers when the Bank recovered its judgment and fastened its liens upon their real estate, the decree of the Circuit Court of Appeals is reversed and the cause remanded to the District Court for further proceedings not inconsistent with this opinion.

Reversed and remanded.